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REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF ADMIRALTY
OF ENGLAND,

AND ON

Appeal to the Privy Council.

1863—1865.

BY

ERNST BROWNING

AND

VERNON LUSHINGTON,

OF THE INNER TEMPLE, BARRISTERS AT LAW.

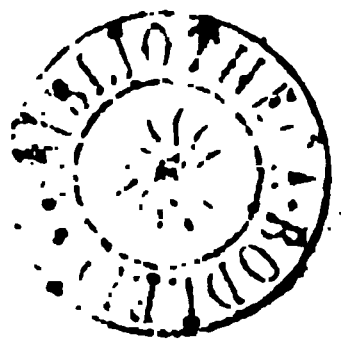
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C A S E S

DECIDED IN THE HIGH COURT OF

ADMIRALTY OF ENGLAND,

AND ON APPEAL TO

THE PRIVY COUNCIL.

THE KASAN.

24 *Vict. c. 10, s. 6*—“*Any Breach of Duty, or Breach of Contract.*”

A foreign vessel was chartered to carry coals on charterers' account to a foreign port, and bring home to England a return cargo of timber; the charterers sued the ship under the 6th section of “The Admiralty Court Act, 1861,” claiming damages—1st, for non-delivery of certain coals on the outward voyage: 2ndly, for the improper delivery of the timber on the return voyage.

Held, that they were not intitled to sue in respect of the non-delivery of the coals abroad, as the statute did not give the Court such jurisdiction.

THIS was an action brought against the Russian ship *Kasan* under the 6th section of the Admiralty Court Act, 1861, by Thomas Dunlop, Finlay & Co., of Glasgow, the charterers of the ship and also holders of the bills of lading for the home-ward cargo.

The petition set out a charter to the plaintiffs whereby the vessel was engaged to proceed from Cardiff to Port Isabella, in the island of Basilan, with a cargo of coals on charterers' account, to be delivered freight free; thence to proceed to Moulmein, or other Indian port, and load a cargo of timber, to be delivered in England according to order. The petition then charged that certain coals, shipped at Cardiff under bills of lading, by Pinto, Perez & Co. (third parties), to be delivered to order or assigns at Port Isabella, were not delivered, whereby the plaintiffs had suffered great damage; and also that certain

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timber shipped on account of charterers at Moulmein, under bills of lading to be delivered in England, was not duly delivered.

The question was now raised on motion, whether the plaintiffs were, under the jurisdiction created by the 6th section of the Admiralty Court Act, 1861, intitled to sue in respect of the non-delivery of the coals on the outward voyage.

The material part of that section is as follows:—

“The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.”

Twiss, Q.C., and *Lushington*, for the defendants, the owners of the *Kasan*.—The Court has no jurisdiction. The whole section applies only to claims in respect of goods imported; it does not apply to goods exported. The words “for any breach of duty or breach of contract” &c., must, by reasonable interpretation, be taken to refer to what has gone before, so as to make “contract” mean contract in respect of the goods carried into England: otherwise “any breach of contract” will mean breach of any contract whatever; it might even mean breach of promise to marry. In the *Ironsides* (a) the Court put a strict interpretation on this very sentence, and confined the words “owner, master, or crew of the ship,” to refer to the ship previously indicated, namely, the ship in which the goods had been actually carried into England.

Deane, Q.C., and *Clarkson*, for the plaintiffs.—The claim comes within the terms of the statute. The plaintiffs are owners of the timber, “goods carried into England” in the *Kasan*; and they are suing “for a breach of contract on the part of the owner or master of the ship.” These latter terms are general, and independent of the terms that precede, and ought to be held to extend to a real grievance like this of which the plaintiffs complain. The defendants would read the word “for” as if it were “by.” Here, moreover, there was but one

(a) *Lushington's R.* pp. 458, 466.

contract, which extended to the outward and the homeward voyage, to the timber and the coals, and the Court has therefore jurisdiction. 1863.
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DR. LUSHINGTON:—If the difficulty of deciding this case corresponded at all to the importance of the question raised, I should take time to consider; but, in truth, I see no difficulty at all. The meaning of the section is quite plain. It is confined to the case of goods carried into England or Wales; even Scotland and Ireland are not included. It has nothing to do with goods exported and by contract deliverable abroad. There is but one sentence; and, upon reading it in a simple, plain way, the words “for any breach of duty or breach of contract” clearly relate to the foregoing “goods carried into England or Wales.” Another argument might be founded upon the proviso which follows, requiring that the owner of the ship shall not be domiciled in England or Wales. For, in many cases of goods exported in a foreign ship, the owner of the ship might be resident in the place where the cargo was to be delivered,—at hand to answer for any alleged breach of the contract. I have no doubt that I cannot pronounce for the extended jurisdiction claimed. I do not however condemn in costs, as this is a novel question on the interpretation of a statute. Judgment.

Rothery, proctor for the plaintiffs.

Clarkson for the defendants.



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THE ST. CLOUD.

Damage to Cargo—Liability of chartered Ship to Holder of Bill of Lading—Notice of Charter to Shipper—Nude Assignee of Bill of Lading—Measure of Damages—24 Vict. c. 10, ss. 6, 35.

A ship-owner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter. In the same circumstances (the owner of the ship not being domiciled in England or Wales), the ship is liable under the 6th and 35th sections of "The Admiralty Court Act, 1861."

By the 6th section, notwithstanding the words "any assignee of a bill of lading," a bare assignee, to whom the property in the goods has not passed, and who cannot therefore sue at common law under 18 & 19 Vict. c. 111, is not intitled to sue in the Admiralty Court.

In cases brought under the 6th section of the Act, the damages will be referred to the Registrar and Merchants, with instructions to follow the rules of the Courts of common law as to the measure of damages.

In case of injury to goods by improper stowage, loss upon a contract of resale entered into before delivery, and of which the defendant had no notice at the time of making the original contract, is not to be allowed.

DAMAGE to cargo. This was a cause instituted by Messrs. Bardgett, Picard & Co., under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), against the St. Cloud, a Genoese vessel, to recover damages for the injury occasioned to certain wheat by improper stowage.

The defendant, the owner of the ship, in his answer to the plaintiffs' petition simply denied the improper stowage, but afterwards obtained leave to plead that the ship was under charter, to which the plaintiffs replied that they had had no notice of such charter. The charter-party was as follows:—

"This charter-party, made the 6th day of June, in the year 1861, between Jean Baptiste Profumo, master of the ship St. Cloud, of Genoa, of the burthen of 814 tons, or thereabouts, register measurement, now lying in the harbour of New York, of the first part; and Archibald Baxter, of the second part: Witnesseth that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the said party of the second part, doth covenant and agree on the freighting and chartering of the said vessel unto the said party of the second part, for a voyage

from New York to London, on the terms following, that is to say :—

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First. The said party of the first part doth engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage.

Second. The said party of the first part doth further engage that the whole of the said vessel (with the exception of the cabin, the deck, and the necessary room for the accommodation of the crew and the stowage of the sails, cables, and provisions) shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid ; and that no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part, or his agent, without his consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part doth further engage to receive and take on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part, or his agents, may think proper to ship.

Fourth. The said party of the first part doth further engage to consign the vessel at the port of discharge to such person or firm as may be designated by the party of the second part, who shall be intitled to the usual commission of $2\frac{1}{2}$ per cent. on the amount of freight earned under this charter.

And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, doth covenant and agree with the said party of the first part to charter and hire the said vessel, as aforesaid, on the terms following, that is to say :—

First. The said party of the second part doth engage to provide and furnish to the said vessel a full cargo of legal merchandise. Grain, if any, in shipper's bags.

Second. The said party of the second part doth further engage to pay to the said party of the first part or his agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say :—

Grain $8\frac{1}{4}d.$ per bushel of 60lbs.

Flour $2s. 7\frac{1}{2}d.$ per barrel. Measurement, 25s. per ton of 40 cubic feet.

Weight, $27s. 6d.$ per ton of 2,240lbs. gross, all in British sterling, with 5 per cent. primage, payable in cash, without discount or allowance, on due delivery of the cargo.

It is further agreed between the parties to this instrument

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that the said party of the second part shall be allowed for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say :—

Thirty running days to load at New York, to be discharged according to the custom of the port for prompt dispatch ; and in case the vessel is longer detained, the said party of the second part agrees to pay to the said party of the first part demurrage at the rate of twenty pounds sterling per day, day by day for every day so detained, provided such detention shall happen by default of the said party of the second part, or his agent.

It is also further understood and agreed that the cargo or cargoes shall be received and delivered alongside of the vessel, within reach of her tackles.

It is also further understood and agreed that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to the party of the second part, or to his agent. It is also understood and agreed that the vessel is to be loaded in accordance with the regulations of the New York underwriters. To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances, and the said party of the second part, the merchandise to be laden on board), each to the other, in the penal sum of seventeen hundred pounds sterling.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals the day and year above written, at New York.

Sealed and delivered in
the presence of

G. BTA. PROFUMO. (L.S.)
ARCH. BAXTER. (L.S.)

E. OTERO.

WM. MURDOCK.”

Shortly after the making of the charter-party, the vessel was laid on at the port of New York for the conveyance of goods to London, and one Thomas Rigney shipped two parcels of wheat, consisting respectively of 1,170 bags and of 943 bags. For each of these parcels Profumo, the master, signed bills of lading, by which the wheat was deliverable “unto order or assigns, he or they paying freight for the said wheat tenpence-halfpenny sterling per bushel of 60lbs. delivered.” These were indorsed by Rigney in blank, and came into the plaintiffs’ hands.

The vessel arrived in London on the 29th July, and the wheat

was delivered to the plaintiffs. Before its delivery they had sold it, in bond, for transhipment to France. It was however found so heated and in such a condition as to be unfit for delivery for transhipment, and to require warehousing. For the expenses thus incurred, amounting to 142*l.* 19*s.* 6*d.*, and for 18*l.* 4*s.* 1*d.*, the difference between the price for which they had contracted to sell the wheat and the price at which they afterwards sold it, the plaintiffs now sued.

It further appeared that the plaintiffs were purchasers of only the second parcel of the wheat, the bill of lading of the first parcel having been indorsed in blank by Rigney merely for the purpose of enabling the plaintiffs to sell it on account of third parties. The bills of lading contained no reference to the charter-party, neither was there any evidence to show that Rigney knew of its existence at the time when he shipped the wheat.

On the hearing, 25th November, 1862, the Court pronounced in favour of the plaintiffs on the facts, the evidence showing that the wheat had been improperly stowed. The questions of law involved now came on for argument.

The 6th and 35th sections of the "Admiralty Court Act, 1861" (24 Vict. c. 10), provide as follows:—

Section 6. "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

Section 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

The Bills of Lading Act, 18 & 19 Vict. c. 111, after reciting "Whereas by the custom of merchants a bill of lading of goods being transferable by indorsement, the property of the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property"—enacts, section 1, that "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such con-

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signment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Brett, Q.C., and *Lushington*, for the defendants.—First. The ship is not responsible, because at common law the ship-owner would not be responsible, but the charterer. This action is in effect an action for a breach of the contract contained in the bills of lading. The cases of *Colvin v. Newberry* (a), affirmed in the House of Lords (b); *James v. Jones* (c); and *Mackenzie v. Rowe* (d); are authorities to the effect that where a person hires the whole of a ship, and lays her on as a general ship, the contract created by the bills of lading, signed by the master, is between the charterer and the shipper of goods. In *Schuster v. McKellar* (e), Lord Campbell, after stating the different kinds of hiring of ships, says, "Notwithstanding some early decisions, it seems now settled by a numerous class of cases from *Newberry v. Colvin* to *Marquand v. Banner* (f), that where there is a hiring of the ship according to the second form above specified, with the intention that the charterer shall employ the ship for his own profit, when the master signs bills of lading he does so as the agent of the charterer, not of the owner. But still, the owner being in possession of the ship by his master and crew, he has rights in respect of this possession, as to claim a lien on goods on board for freight due to him; and he is liable for the acts and negligence of the master irrespective of the contracts entered into by the master with the shipper of goods as agent for the charterer. Thus the owner, although the ship be so chartered, is clearly liable for a collision arising from the improper management of the ship, and for what the master does within the scope of his general authority as master, which cannot be ascribed to his agency for the charterer. Here the plaintiffs do not claim under any bill of lading, &c."

It is immaterial that there is no evidence to show that Rigney, the shipper, had notice of the charter-party; he had the means of knowing, and probably did know; but if he did not think fit to inquire for his own interest, as any prudent shipper would have done, the plaintiffs who claim through him cannot avail themselves of the want of such knowledge: *Broadbent v. Barlow* (g). As in the case of *Blaikie v. Stembridge* (h), it is expressly

(a) 7 Bing. 209.

(b) 1 Cl. & F. 283.

(c) 3 Esp. 27.

(d) 2 Camp. 482.

(e) 7 Ell. & B. 704, 724.

(f) 6 Ell. & B. 232.

(g) 7 Jur., N. S. 479, 480.

(h) 6 C. B., N. S. 894, 911.

said that a shipper of goods on board a general ship is not intitled to conclude without inquiry that goods are to be stowed by the master rather than by the stevedore; so here, considering how common is the custom of chartering ships, the shipper had no right to assume that the ship was not chartered. Upon the charter being proved, it ought to lie with the plaintiffs to show that the shipper had not notice of it.

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There being then no liability on the defendant at common law, we submit the Admiralty Court Act does not make his ship liable. The intention of the legislature was clearly to give a more efficient remedy against offending shipowners; but it does not profess to make them answer for breaches of contract, or breaches of duty, for which they would not have been responsible by proceedings in personam previously to the passing of the Act. The 35th section of the Act gives the Court jurisdiction in rem in general terms; but the res proceeded against must surely be the res of an offending party. Proceedings in rem are always liable to the control of equitable considerations, for the proposition that the ship is in default is a fiction, and must therefore not be strained: Broom's Maxims, page 120. In the *Druid* (a), the Court said, "The liability of the ship and the responsibility of the owners are convertible terms," and dismissed the suit on the ground that no action would have lain against the owners at common law. So Bynkershoek says in his work *De Foro Legatorum*, Chapter II., "Forum competens unde æstimari oporteat.—Cur bona detinemus, nisi quod subsint imperio ejus, qui injectâ manu, detinere jubet, sive mobilia, sive immobilia sint? Cur ea detentio jurisdictionem tribuit, nisi quod judex bona rei, a se damnati, possit executionem dare?" Moreover, if the shipowner is now compelled to pay, he cannot recover over from the charterer; or, at least, his only remedy is in a foreign tribunal, so that the plaintiffs are endeavouring to impose on the defendant the grievance of which they themselves are complaining.

[DR. LUSHINGTON:—Do you not thus frustrate the object of the Act of Parliament in all cases of chartered ships?]

We say that if a vessel is chartered as here, the Act did not intend to give, and does not give, a remedy in rem. Many cases may be cited to show how general words in a statute may be construed to have a limited meaning only; *Hawkins v. Gathercole* (b); none more remarkable than the case of the *Zollverein* (c), decided in this Court.

Secondly. As to the first parcel of wheat, the plaintiffs, being

(a) 1 W. Rob. 399.

(b) 6 De G., M. & G. 1.

(c) Swabey, 96.

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bare assignees of the bill of lading for the purpose of resale, cannot sue for damage done to that parcel, as they had no property in the wheat. At common law, no indorsee of a bill of lading could sue thereon. The right to sue is derived from the Bills of Lading Act, 18 & 19 Vict. c. 111. But the first section of that Act expressly limits its operation to the assignee or indorsee to whom the property in the goods therein mentioned shall pass. Moreover, if the defendant be held liable to the plaintiffs with respect to this parcel, he may have to pay twice over. He may be sued by the real owner of the goods. What answer would he have to such an action? He could not plead the judgment recovered here; for the true owner is not a party, neither is he privy, to this suit. Besides, there may be many defences against the true owner of the goods which are not available as against the present plaintiffs. "Any claim" in the section, we submit, means "any legal claim."

Thirdly. As to damages.—The defendant has nothing to do either with the expenses incurred in and about warehousing the wheat, or with the contract of resale. The true measure of damages is the difference between the value of the damaged goods and the market price at the time of their delivery: *Josling v. Irvine* (a). This arises out of the general rule laid down in *Hadley v. Baxendale* (b). Even were it otherwise, there is in the present instance no sufficient contract to satisfy the 17th section of the Statute of Frauds (c).

Twiss, Q.C., and *Clarkson*, for the plaintiffs.—In this case the owner has not parted with possession of the vessel by the terms of the charter-party, which do not amount to a demise of the ship: *Christie v. Lewis* (d). The cases quoted by the other side, in support of a contrary doctrine, are cases in which the vessels were let for lump sums, and do not therefore apply. The case of *Saville v. Champion* (e) is an illustration of the general proposition, that where the owner does not demise the ship, and give up entire possession to the charterer, he shall have a lien upon the cargo for his freight; and if he have a lien—such a lien as the common law will infer from the contract—it is clear that he must answer for damage to the cargo, otherwise there would be no mutuality. The principle of mutuality between the shipowner and the assignee of the bills of lading is recog-

(a) 6 H. & N. 512, 516, 518.

(b) 9 Exch. 341.

(c) 29 Car. 2, c. 3.

(d) 2 Brod. & B. 410.

(e) 2 B. & Ald. 503.

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nized in the old cases of *Cock v. Taylor* (a), *Kemp v. Clark* (b). But we go further. We contend that the "Admiralty Court Act, 1861," gives the Court power to enforce, by procedure in rem, another kind of lien unknown to the common law, viz., the maritime lien thus described in Kent's Commentaries on American Law (c): "The ship itself in specie is considered as a security to the merchant who lades goods on board of her, and it makes no difference whether the vessel be in the employment of the owner directly, or be let by a charter-party to a hirer who was to have the whole control of her. By custom, says Cleirac, the ship is bound to the merchandise, and the merchandise to the ship." A maritime lien is a charge on the property, and procedure in rem to enforce it is not a mere means of bringing a defendant into Court: *Bold Buccleugh* (d). A maritime lien existed in such cases as the present independently of the Act of Parliament; but there was no means of enforcing it. Formerly, as appears from 32 Hen. 8, c. 14, and Mr. Justice Story's judgment in *The Schooner Volunteer* (e), the Court of Admiralty had jurisdiction over charter-parties. The Act has now given this Court the power in these cases to enforce this maritime lien against the ship.

Then again, in the cases cited to show that the charterer and not the owner is responsible, there was evidence of notice to the shipper of the charter of the vessel, which is not the case here. Notice is material: the case of *Major v. White* (f) is an authority that, in order to get rid of his primâ facie liability to consignees of cargo, the shipowner must prove that the charter was within the knowledge of the shipper; and in *Swainston v. Garrick* (g), Lord Lyndhurst and the Court of Exchequer held that, notwithstanding a charter to a third party, the shipowner remains liable to the consignees for damage to cargo. In *Newberry v. Colvin* (h), it was expressly found that the charter had been communicated to the shippers.

Secondly. As to the right of the plaintiffs to sue.—We rely upon the very comprehensive wording of the 6th section of the "Admiralty Court Act, 1861," as intitling a bare assignee of a bill of lading to sue for damage done to goods therein mentioned. The words are:—"The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried," &c. Had it been intended to limit its operation to assignees of bills of

(a) 13 East, 399.

(b) 12 Q. B. 647.

(c) 10th ed., vol. iii., p. 304.

(d) 7 Moore, P. C. 267, 284.

(e) 1 Sumner, p. 555.

(f) 7 Carr. & P. 41.

(g) 2 L. J., N. S., Exch. 255.

(h) 7 Bing. 206.

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lading to whom the property in the goods passes by the assignment, the legislature would have taken care to impose such limitation by express words, as it has done in the Bills of Lading Act. We submit that the Court cannot import the words "to whom the property in the goods therein mentioned shall pass" from the Bills of Lading Act into the 6th section of the Admiralty Court Act. Were this done, it would render the word "assignee" in that 6th section altogether unmeaning and superfluous, because everything intended would then be expressed by the word "owner."

Thirdly. The plaintiffs are intitled to the whole amount of damages claimed. They fall within the rule laid down in *Hadley v. Baxendale* (a), that the proper measure of damages must be taken to be such damages as might reasonably have been anticipated by both parties as a natural consequence of a breach of the contract. *Smeed v. Foord* (b), where a farmer was allowed to recover for damage to his corn arising from non-delivery of a threshing-machine on the stipulated day, is in point, and in the plaintiffs' favour. In *Dunlop v. Higgins* (c) it was held, that in Scotland the measure of damages on breach of a contract for the sale of goods is not merely the amount of the difference between the contract price and the market price at the time of the breach; but an additional compensation may be allowed for such profit as might have been made by the purchaser had the contract been performed. *Waters v. Towers* (d) is a decision to the same effect, applicable to England. It also disposes of the objection raised by the other side under the Statute of Frauds: one of the points decided being that a plaintiff may recover damages in respect of profits arising out of a contract with a third person, although that contract be void by the Statute of Frauds.

Lushington replied.

On the 13th of January, 1863, DR. LUSHINGTON gave judgment.

Judgment.

The St. Cloud is a vessel owned by the defendant, Leonardo Gustaldi by name, and a resident at Genoa. In the month of June, 1861, the vessel was lying at New York, under the command of Baptista Profumo, as master. On the 6th day of June a charter-party under seal was entered into by Profumo, therein called master, of the one part, and Archibald Baxter of the other

(a) 9 Exch. 341.

(b) 1 Ellis & Ellis, 602, 613.

(c) 1 H. of Lords, 381, 403.

(d) 8 Exch. 401.

part, whereby the St. Cloud was chartered to Baxter for a voyage from New York to London. On the 17th day of June one Thomas Rigney shipped on board 943 bags of wheat, whether with or without notice of the charter-party does not appear. The bill of lading contains no reference to the charter-party; it does not state to whom freight is payable, and it is simply signed by Profumo as master.

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On the 24th day of June a further parcel of wheat, consisting of 1,170 bags, was shipped, and a similar bill of lading executed. Both bills of lading were alike assigned to the plaintiffs, Messrs. Bardgett, Picard & Co.; but, as appears from the evidence of Mr. Picard himself, only one of the bills of lading—that which comprised the second parcel of 1,170 bags—was assigned to them as purchasers; the other was assigned to the plaintiffs to enable them to receive the goods and sell them for third parties.

On the 29th of July the St. Cloud arrived at the Victoria Docks, and Profumo delivered to the plaintiffs the two parcels of wheat, and received the freight. Before the arrival of the vessel, the plaintiffs sold the two parcels of wheat to Messrs. Dressler, at the rate of 49s. 6d. per 496 lbs.; but upon examination, after arrival, they found the wheat in such heated condition as to render delivery under the sub-contract impossible. The wheat was then landed and warehoused, and divers expenses incurred, amounting to 142l. 19s. 6d. The wheat was finally sold, and comparing the price actually obtained with the price which would have been realised if the contract with Messrs. Dressler had been carried out, the loss was upon the parcel of 1,170 bags, 11l.; upon the parcel of 943 bags, 7l. 4s. 1d.; in all, 18l. 4s. 1d.

In September, 1861, the plaintiffs, Messrs. Bardgett, Picard & Co., instituted a suit in this Court against the St. Cloud, alleging that the injury to the corn had been caused by bad stowage, and claiming for expenses 142l. 19s. 6d.; for loss on sale of corn, 18l. 4s. 1d.; total, 161l. 3s. 7d.

The defendant in the first instance simply pleaded in effect a denial that the bad condition of the corn was owing to improper stowage; but in March, 1862, the pleadings were amended, and the defendant further pleaded that at the time when the bills of lading and contracts mentioned in the petition were entered into by Profumo the master, the St. Cloud had been chartered to certain persons in New York for the voyage. The plaintiffs, in their reply, denied the fact of such charter, and pleaded further that if in fact the St. Cloud had been so chartered at the time alleged, the plaintiffs had not then any notice thereof. On

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the trial, the Court found the facts to be that the damaged state of the corn had been occasioned by improper stowage; but all legal questions of the liability of the defendant to the plaintiffs were left open.

24 Vict. c. 10,
s. 6; its inten-
tion.

The questions now raised are of infinitely greater importance than the pecuniary interests at stake. The Court is required to pronounce an opinion upon the construction in several points of the 6th section of the Admiralty Court Act, 1861. The material portion of that section, which is one of the most important enactments contained in the statute, is in the following words:—

“The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.”

The general intention of the Legislature cannot be doubtful. The statute is remedial. The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, was frequently a grievous injury for which there was no practical remedy; for, the owners of such vessels being resident abroad, no action could be successfully brought against them in a British tribunal. To send the merchant who had sustained a loss to commence a suit in a foreign tribunal, and probably in a distant country, could not be deemed a practical or effectual remedy. With a view to obviate a grievance so oppressive to British merchants, the enactment contained in the 6th section was passed. It was intended to operate by enabling the party aggrieved to arrest the ship in cases where, from the absence of the shipowner in foreign parts, the common law tribunals could afford effectual redress.

Here the ship was chartered, but not so as to constitute the charterer the temporary owner:

Such being the obvious intention of the statute, I will now proceed to consider the questions which have been discussed at the bar. In the first place, then, it is contended on the part of the defendant, the shipowner, that, by reason of the charter-party and the nature of the action, the charterer alone, and not the owner of the ship, would be liable at common law for the damage done to the goods; and that this Court ought therefore to hold, as the true construction of this statute, that the plaintiff cannot maintain his suit against the ship. It is obvious

that if the first of these two propositions be not founded in law, it is unnecessary to consider the second. I regret that I should have to pronounce an opinion upon a question of purely common law ; but I have no alternative. I therefore proceed to form the best judgment I can upon the question, whether, considering the form of the charter-party, coupled with the fact that there is no evidence that the shipper had notice of the charter, an action at common law would lie against the charterer exclusively.

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When goods have been shipped in good condition on board a vessel, and, by the misconduct or neglect of those in charge of her, loss occurs, some one must be responsible. I apprehend that *primâ facie* the owner of the vessel is the person responsible ; but the cases decided at common law show that there are circumstances under which the owner will be divested of such responsibility, and that responsibility will be cast upon another. Such is the case of a vessel demised by charter to another, so as to divest the owner altogether of possession, when the charterer is, *pro hac vice*, the owner ; *Colvin v. Newberry (a)*. The present charter-party I apprehend to be clearly not one of this description. There is no demise of the vessel. The owner through his master retains possession. There is a covenant to consign the vessel as the charterer may designate. There is a reservation of the cabin and deck ; and for the goods shipped the charterer is to pay the owner certain rates of freight mentioned in the charter-party. This appears to me to be clearly distinguished from a charter-party demising and giving up possession of the vessel.

It is contended, however, that the contract contained in the bill of lading was made by the master as agent of the charterer, and not as agent of the owner ; and, in support of this position, is cited the case of *Schuster v. McKellar (b)*. But there is an important distinction in this case. The shipper is not proved to have had notice of the charter-party. Until he had such notice, he would be justified in supposing that in dealing with the master for the carriage of his goods, he was dealing with the owner's agent. For *primâ facie*, the master is the agent of the owner of the ship. I cannot think that it is consistent with justice, or according to ordinary mercantile practice, that a shipper of goods on board a ship put up in the usual way should lose his right to sue the owner for damage, on account of a charter of this description, of which he has no notice. I think the burthen of proof must fall upon the shipowner claim-

and there being no evidence that the shipper had notice of the charter, the shipowner remains liable for a breach of the contract in the bill of lading ; and therefore his ship is also liable.

(a) 1 Cl. & F. 283.

(b) 7 Ell. & B. 704.

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ing exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract, the master was agent for the charterer.

For these reasons I have come to the conclusion that it is not satisfactorily shown that in this case an action might not have been maintained in a common law tribunal against the present defendant, had he been in this country, and amenable to the jurisdiction. I need not go further; for, unless this were established to my satisfaction, the second question cannot arise; the shipowner being liable, his ship is liable by the statute.

The plaintiffs, being nude assignees of one of the bills of lading, could not sue upon the contract in a court of common law; can they sue the ship by virtue of the Admiralty Court Act? Reasons considered.

The next objection is the following:—The defendant contends that the plaintiffs cannot maintain an action for the damage occasioned to the first of these two parcels of wheat, because of the bill of lading of that parcel they were merely nude assignees, having no property in the wheat. As to the fact, it certainly appears from the evidence in this case that the plaintiffs were no more than nude assignees as to the parcel of wheat consisting of 943 bags. As to the law, prior to the Bills of Lading Act (a) no assignee could sue upon bills of lading. The first section of that Act is in these words:—“Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, *to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement*, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself.” It is clear then, I apprehend, that the assignment to the plaintiffs of the bill of lading for the 943 bags had not the effect of enabling them to maintain an action in a Court of Common Law for the damage done to the wheat; for, before the Bills of Lading Act, they would not have had a right to sue at all; and by that statute they would acquire no such right, not being indorsees of the bill of lading, to whom the property in the goods had passed.

The sole remaining question, therefore, upon this part of the case is, whether by the Admiralty Court Act this action can be maintained, no such action being maintainable in a Court of Common Law. The position assumed by the defendant is that the Legislature did not intend to create a new right of action; but merely, where an action could not, by reason of the absence of the defendant, be successfully prosecuted at common law, to render the Court of Admiralty auxiliary by giving this Court

(a) 18 & 19 Vict. c. 111.

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jurisdiction to proceed and arrest his property. This argument, founded upon the Bills of Lading Act, deserves grave consideration; though it is not necessarily conclusive, because, if there be a practical grievance, it must be quite open to the Legislature to create a new right of action, if need be. In fact, it appears to me that the present question is simply one of construction, involving, however, consideration of the whole enactment and the subject-matter with which it deals.

In attempting to construe a statute, I must declare my strong predilection for adhering to the plain words of the Act of Parliament, wherever it is possible. *Verbis plane expressis omnino standum est*; I have a great dislike to that which I must call judicial legislation; and though there are other authorities which I am bound to respect, I concur rather with those judges who in times past have lamented departing from the words of a statute. Now, *primâ facie*, the words of the 6th section of the Admiralty Court Act would give every assignee, whether for value or not, a right to sue in this Court, the words being "any owner, consignee, or assignee of any bill of lading." But the defendant contends that, though there is no qualification attached to the word "assignee" in this statute, still it must be read so as to bring it into unison with the first section of the Bills of Lading Act. At first sight, it is certainly rather a strong proposition, that the Court is to insert the words "to whom the property in the goods shall pass." Let me consider what reasons there are for and against this proposition.

First, the words of the section. It has been said, and I think truly, that the words used in the section being "owner or consignee or assignee," the Court must give a distinct meaning to each; and it is then argued that if I interpret "assignee" to mean only an assignee "to whom the property in the goods shall pass," there is no clear distinction between such assignee and the "owner;" but this is not quite so. The "owner," I conceive, is the person originally possessed of the goods; the "assignee" spoken of is the person to whom the bill of lading is assigned. I think this is the answer to the argument just stated, but it does not remove the chief difficulty, namely, engrafting on the word "assignee" a qualification not to be found in any terms expressed.

Again: the preamble says, "Whereas it is expedient to extend the jurisdiction, and improve the practice of the High Court of Admiralty." I think the inference to be drawn from this preamble somewhat doubtful, but rather in favour of the defendant's position. He contends that the true inference is that the Act intends to confer jurisdiction where the right of

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action already exists, not to create a new right of action. The preamble, I think, throws but little light upon the question.

Then, returning to the 6th section. It declares that the Court “shall *have jurisdiction over any claim* by the owner or consignee or assignee of any bill of lading of any goods.” What is the true construction of the term “any claim”? I think that the true construction of the words “any claim” is “any claim lawfully existing independently of this act.” It may be said, I think with some force, that if it was intended to create any new right of action, the Legislature would have expressed such intention in clearer and more intelligible terms. Moreover, the whole of this section must be considered, and especially the proviso which prohibits the exercise of the jurisdiction conferred, if at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. Now observe the consequence of adopting the plaintiffs’ interpretation. A nude assignee would, if the owners of the ship were out of the country, have a right of action in the Admiralty Court, and in that alone; but if the owners of the ship were in this country, such nude assignee would have no right of action, either in the Admiralty Court or in one of the Courts of Common Law. Such a consequence is so inconsistent with reason that I cannot believe it was the intention of the Legislature. There is another consequence that might possibly happen, which I will briefly mention. If a bare assignee were permitted to sue, the ship might be sold, and the proceeds paid to him. The owner of the goods, if resident abroad, might lose all his remedy against the ship.

Upon consideration of all these matters, I have come to the conclusion that a nude assignee is not, by virtue of this statute, intitled to sue in the Admiralty Court. The claim must therefore be confined to the one parcel of wheat of which the plaintiffs were owners by purchase.

The damages to be referred to the Registrar, with direction that the plaintiffs shall not recover for loss on the sub-contract.

The last question necessary to be determined relates to the amount of damages which the Court under these circumstances ought to decree. The Court is not accustomed to assess damages in the first instance; and I am not disposed in this case to depart from the ordinary course. I shall refer the amount of the damages to the Registrar and Merchants. The Registrar will bear in mind the cases of *Josling v. Irvine* (a) and *Peterson v. Ayre* (b). Those are cases similar to, but not the same as,

(a) 6 H. & N. 512.

(b) 13 C. B. 353.

the present; because in them there was no delivery at all. From consideration of those two cases, I am led to conclude that, at common law, in assessing damages for breach of contract under circumstances like the present, no regard would be paid to the existence of a sub-contract; but the damages awarded would be such a sum as, at the time of the breach, would be required to put the plaintiffs in the same position as if no breach had been committed. This mode of assessing the damages may be different from that usually adopted in this Court; but the only cases of damage to be found on the records of this Court are cases arising from collision; and those, it must be remembered, are cases of tort, whilst the present is one of breach of contract. I must order the reference; but I would fain hope the matter may be settled between the parties without the order being carried into execution. I deeply regret that this action should have produced so long and so expensive a litigation. The truth, however, is that in the first instance neither party took a clear view of their own case.

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Clarkson and Son, proctors for the plaintiffs.

Deacon, proctor for the defendant.

THE LEDA.

*Practice—Costs against the Crown—18 & 19 Vict. c. 90—
Co-plaintiffs severally liable for costs.*

In a cause of damage instituted on behalf of Her Majesty in her office of Admiralty, and of the commander and crew of one of Her Majesty's ships, against a private shipowner, the Court, on a finding for the defendant, declined to condemn the Crown in costs, but condemned the commander and crew to pay the whole of the costs.

The 18 & 19 Vict. c. 90, authorizing costs to be given to or against the Crown, applies only to proceedings in which the Attorney-General or Lord Advocate is a party.

Co-plaintiffs are severally liable to the whole of the costs.

THIS cause was instituted on behalf of Her Majesty in her office of Admiralty, and also on behalf of George Bones, commanding Her Majesty's cutter *Badger*, and of the crew of the said cutter, against the steamship *Leda*, for damages occasioned by a collision in the Bay of Dublin, by which the *Badger*

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was sunk. The owners of the Leda, Messrs. Thompson & Co., defended the action.

On the hearing, on the 27th November, 1862, the Court pronounced against the claim, but reserved the question of costs, which now came on for argument.

The statute 18 & 19 Vict. c. 90 provides as follows :—

“ An Act for the Payment of Costs in Proceedings instituted on behalf of the Crown in matters relating to the Revenue, and for the amendment of the Procedure and Practice in Crown Suits in the Court of Exchequer. [14th August, 1855.]

“ Whereas in divers proceedings instituted by or on behalf of the Crown against the Queen’s subjects in respect of matters relating to the revenue no costs are recovered by the Crown, except in certain cases, and no costs are paid by the Crown to the subject : And whereas it is expedient to assimilate the law as to the recovery of costs in such proceedings by or on behalf of the Crown to that in force as to proceedings between subject and subject : Be it therefore enacted :—

“ In all Crown suits, &c., where the Crown is successful, costs to be recovered as between subject and subject.

“ I. In all informations, actions, suits, and other legal proceedings to be hereafter instituted before any court or tribunal whatever in the United Kingdom of Great Britain and Ireland, by or on behalf of the Crown, against any corporation, or person or persons, in respect of any lands, tenements or hereditaments, or of any goods or chattels, belonging or accruing to the Crown, the proceeds whereof, or the rents or profits of which said lands, tenements, or hereditaments, by any Act now in force or hereafter to be passed are to be carried to the Consolidated Fund of Great Britain and Ireland, or in respect of any sum or sums of money due and owing to Her Majesty by virtue of any vote of Parliament for the service of the Crown, or of any Act of Parliament relating to the public revenue, Her Majesty’s Attorney-General, or in Scotland the Lord Advocate, shall be intitled to recover costs for and on behalf of Her Majesty, where judgment shall be given for the Crown, in the same manner, and under the same rules, regulations, and provisions, as are or may be in force touching the payment or receipt of costs in proceedings between subject and subject, and such costs shall be paid into the Exchequer, and shall become part of the Consolidated Fund.

“ Defendant intitled to costs, if successful against the Crown.

“ II. If in any such information, action, suit, or other proceeding, judgment shall be given against the Crown, the defendant or defendants shall be intitled to recover costs, in like manner, and subject to the same rules and provisions, as though such proceeding had been had between subject and subject ; and it

shall be lawful for the Commissioners of Her Majesty's Treasury and they are hereby required to pay such costs out of any monies which may be hereafter voted by Parliament for that purpose."

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Deane, Q.C. (*Lushington* with him), for the defendants.—The defendants are intitled to their costs, by the statute 18 & 19 Vict. c. 90, and also by the practice of the Court. In the case of Her Majesty's ship *Swallow* (a), that vessel having been held solely to blame for a collision, costs were given to the plaintiff by this Court. So, in the case of Her Majesty's ship *Inflexible* (b). The Courts of Equity do not recognize any such principle as that the Crown shall neither receive nor pay costs. Sir John Leach, in delivering judgment in *The Attorney-General v. The Earl of Ashburnham* (c), after remarking that he could find no such general principle in the Courts of Equity as that the Crown can neither receive nor pay costs, proceeds to say, "The Attorney-General constantly receives costs where he is made a defendant in respect of legacies given to charities, and even where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy;" and accordingly the defendant was condemned in the costs. This case was recognized by Vice-Chancellor Stuart in *Kane v. Reynolds* (d). Again, in the case of the *Attorney-General v. The Corporation of London* (e), Lord Langdale refused to recognize any general rule that the Crown should neither receive nor pay costs; and in the same case on appeal (f), Lord Cottenham said:—"This case stood over for the purpose of my making some inquiries as to the course of proceeding with regard to costs where the Attorney-General is a party. I have had an opportunity of looking at a variety of instances, which clearly show that although there may be and has been a generally received opinion, a sort of saying, that the Attorney-General neither pays nor receives costs, yet that it is open to a variety of exceptions, and that there are very many cases to be found in which that rule has not been acted upon. There does not, however, appear to have been a very general practice or understanding upon the subject." It is true that in the case of the *Duke of Sussex* (g), this Court refused to give costs against the Crown, observing that, "although there had been much wavering upon the subject, the true principle was that the Crown neither gave nor took costs." But that case was decided without argument. On the other

(a) Swabey, 30.

(b) Swabey, 32.

(c) 1 Sim. & S. 394, 397.

(d) 2 Sm. & Gif. 334.

(e) 12 Beavan, 171, 178.

(f) 2 Mac. & G. 247, 269.

(g) 1 W. Rob. 270, 274.

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hand, in the *Queen v. Belcher—Illeanon Pirates* (a), where the Lords of the Admiralty had appealed to the Privy Council against a decision of this Court, their appeal was dismissed with costs; and in *Dyke v. Barton* (b), the Privy Council gave costs against the Procurator-General, as nominee of the Crown contesting the validity of a will. At all events, the defendants are intitled to costs against the commander and crew of the *Badger*, the co-plaintiffs in this cause.

Sir R. Phillimore (Queen's Advocate), and *Dr. Twiss* (Admiralty Advocate), contra.—The Court has no power to condemn the Crown in costs, save by statute: *R. v. Miles* (c). Blackstone says:—"The king, and any person suing to his use, shall neither pay nor receive costs; for besides that he is not included under the general words of these statutes, as it is his prerogative not to pay them to a subject, so it is beneath his dignity to receive them" (d). The 18 & 19 Vict. c. 90 does not apply to the present case—First, Because this is not *such* a proceeding as any of those enumerated in the first section of the Act. Secondly, Because, if this action were in its nature similar to any of the proceedings mentioned in the Act, still no costs could be given against the Crown, the Attorney-General not being a party to the suit. The cases in the Court of Equity, relied on by the defendants, were before the passing of the Act, and are not authorities in favour of condemning the Crown in costs. In the *Attorney-General v. Lord Ashburnham* (e), and the *Attorney-General v. The Corporation of London* (f), the question was not whether the Crown should be condemned in costs, but whether it should receive costs. In the former case Sir John Leach refused to recognize the principle that the Crown neither receives nor pays costs, giving as a reason the fact that "the Attorney-General constantly receives costs in certain cases." And in the case of the *Attorney-General v. The Corporation of London* (g), Lord Cottenham expressly restricts that principle by the following observations:—"I have consulted with the best authorities upon the subject, and we are all of opinion that it would be well to consider, not as a rule without exception (because it is always matter of discussion to a certain extent), but as a general rule, that the principle that the Attorney-General never receives nor pays costs, may be modified in this way, namely, that the Attorney-General never receives costs

(a) 6 Moore, P. C. C. 471, 484.

(b) 10 Moore, P. C. C. 458.

(c) 7 Term Rep. 367.

(d) Sweet's Blackstone, iii., 400.

(e) 1 Sim. & S. 394.

(f) 12 Beav. 171.

(g) 2 Mac. & G. 247, 273.

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in a contest in which he could have been called upon to pay them had he been a private individual. That would give all the protection to the suitor opposed to the Attorney-General which is in justice due to him, and at the same time discourage what I think is too often the case, namely, carrying on an unnecessary and improper litigation in consequence of that rule." Those cases do not serve the defendants. They merely go to this extent, that there are cases in which the Crown may receive costs, but that, unless under some special statute, it never pays costs. That such is the true rule is apparent from the judgment in *Kane v. Reynolds* (a). Lord Cranworth there says:—"Now as to the right of the Crown to receive costs generally, a great deal of discussion was had at the bar; but in my opinion that discussion was entirely irrelevant to the present purpose. Many questions may arise as to when the Crown is to be in no different situation from the subject in respect, not of paying costs (for that I believe is never done, the Crown is never made to pay costs), but of receiving costs, for sometimes it is in a position to receive costs. The Crown personally is never made to pay costs; it may be that the relator in an information is made to pay costs, but, as a general proposition, the Crown never pays costs; and where it is suing on its own personal account, it never receives costs." And in the case of *Smith v. The Earl of Stair and others, Officers of State in Scotland* (b), where the Crown had obtained a judgment in the Court below, which was reversed on appeal, the House of Lords refused to give costs to the Crown, evidently on the ground that the Crown would not have been liable to pay costs had the judgment been against it. With regard to the cases of the *Swallow* (c) and the *Inflexible* (d), relied on by the defendants, those were not really Crown cases: they were proceedings against the commanders of the respective vessels. The only remaining case against us is that of the *Illeanon Pirates* (e); but there the Lords of the Admiralty seem to have undertaken to pay costs in order to obtain leave to appeal under exceptional circumstances. The *Duke of Sussex* (f), on the other hand, is a positive authority in this Court in favour of the Crown's exemption from costs. The Court would not have power to enforce any decree for costs against the Crown: a point illustrated by the *Athol* (g).

As to the liability of the commander and crew of the *Badger*

(a) 4 De G., M. & G. 565, 571.

(b) 2 H. of L. Cases, 807, 810.

(c) Swabey, 30.

(d) Swabey, 32.

(e) 6 Moore, P. C. 482, 484.

(f) 1 W. Rob. 270.

(g) 1 W. Rob. 374.

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to pay the whole costs as co-plaintiffs, they are not so responsible. This action must be regarded not as one where all the plaintiffs sue in the same right, but as two actions consolidated; and the ordinary liability of co-plaintiffs to costs does not, therefore, attach.

Deane, Q.C., replied.

On the 20th of January, DR. LUSHINGTON gave judgment.

Judgment.

On behalf of the plaintiffs it was contended that the statute 18 & 19 Vict. c. 90 does not apply to a cause instituted by any other than the Attorney-General, and therefore that no costs could be given against the Lords of the Admiralty. For the defendants it was argued that the statute applied to all causes instituted on behalf of the Crown; but that, at any rate, the commander and crew, the co-plaintiffs, as ordinary subjects, were liable to pay the whole costs.

I propose to examine the practice of the several Courts in this matter both before and after the passing of the statute.

Before the 18
& 19 Vict.
c. 90, no costs
were given
against the
Crown.

1stly. Before the statute 18 & 19 Vict. c. 90.

The general rule as to the exemption of the Crown from costs is laid down by the highest authority, the House of Lords, in the case of the *Lord Advocate v. Lord Dunglas* (a). It was there held that the Lord Advocate of Scotland, or other officer of the Crown, suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted; that in this respect the prerogative of the Crown is the same in Scotland as in England, and obtains whether the property, relative to which the suit is instituted, is under the management of the Lords of the Treasury, or of the Commissioners of Woods and Forests, &c.

At Common
Law.

In the Courts of Common Law.—The Crown neither gave nor received costs. The reason for this seems to have been that no costs were recoverable from any party except by virtue of special statutes; that the statute of Gloucester, 6 Edw. I. c. 1, by which costs were first made recoverable, did not mention the Crown, and therefore did not bind the Crown. But by a later statute, 33 Henry VIII. c. 39, s. 54, it was expressly provided that the king should recover his specialty debt with costs. This is stated by Sir John Leach in the *Attorney-General v. Lord Ashburnham* (b).

In Equity.

In the Courts of Equity.—The Crown never paid, but some-

(a) 9 Cl. & F. 173, 212.

(b) 1 Sim. & S. 394, 397.

times received costs : *Kane v. Reynolds* (a). The reason was, not that the Court had no authority to make a decree condemning the Crown in costs, but that it had no power to enforce such a decree, if made. When therefore Vice-Chancellor Stuart did make such a decree, the Lords Justices overruled it : *Attorney-General v. Hanmer* (b). As however these Courts would not condemn the Crown in costs, from equitable considerations they rarely gave costs to the Crown.

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In the Admiralty Court.—The Crown neither gave nor took costs. Such was my decision in the case of the *Duke of Sussex* (c)—a decision founded upon the practice of the Courts of Common Law, and the doctrine generally acknowledged in the profession. In the Admiralty Court.

In the Judicial Committee of the Privy Council.—The case of the *Queen v. Belcher—The Illeanon Pirates* (d) must not be pressed too far. There the Judicial Committee allowed an appeal to be made, under exceptional circumstances, by the Lords of the Admiralty upon an order, or rather a recommendation, that costs should be paid. Lord Brougham (e) said :—
“ We have no doubt that due consideration will be given in the proper quarter to the question of costs, as, were this an ordinary case, no leave would be granted, but upon the payment of costs.” So far therefore that case cannot be taken as a precedent for an order against the Crown to pay costs ; it rather tends the other way. Nevertheless, it appears that when the appeal came on to be heard on its merits, the judgment of the Court below was affirmed ; and the cause is said to have been remitted with costs ; though it does not so appear in the report. It is doubtful whether the Crown did not consent to be liable for costs in order to obtain leave to appeal. In the case of the *Swallow* (f) I gave costs to the plaintiff on the authority of the case of the *Queen v. Belcher* ; but it must be observed that I had not then had the opportunity of so narrowly examining that case ; and also that the defendants were not the Lords of the Admiralty, but Mr. King, the commander of the *Swallow*, who appeared by direction of the Lords of the Admiralty. This case was subsequent to the passing of the statute, which was not however adverted to, my judgment being based on the decree in the *Queen v. Belcher*. In the Privy Council.

2ndly. After the statute 18 & 19 Vict. c. 90.

After the 18 &
19 Vict. c. 90.

In the Courts of Common Law.—In *Reg. v. Beadle* (g), the

At Common
Law.

(a) 4 De G., M. & G. 565, 571.

(e) Page 482.

(b) 4 De G. & J. 205.

(f) Swabey, 30, 32.

(c) 1 W. Rob. 270, 274.

(g) 7 El. & B. 492.

(d) 6 Moore, P. C. C. 471.

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terms and effect of the statute were carefully considered by the Court of Queen's Bench. It was there held, most reluctantly, but unanimously, by Lord Campbell, Erle, J., and Crompton, J., that the statute only authorized the giving of costs to or against the Crown in cases where the party to the action was the Attorney-General or the Lord Advocate; and an order of Quarter Sessions, condemning the excise officer in costs, was therefore quashed. I must observe, however, that the case of *Dyke v. Barton*, presently mentioned, was not on that occasion brought to the notice of their lordships.

In Equity.

In the Courts of Equity.—The case of the *Attorney-General v. Sir J. Hanmer and others* (a) was commenced before the passing of the Act. The proceedings, in the first instance, were against Sir J. Hanmer alone. After the passing of the 18 & 19 Vict. c. 90, other persons were made defendants also. Vice-Chancellor Stuart dismissed the information, with costs to all the defendants. The Crown appealed against that part of the decree which gave costs to Sir J. Hanmer, and procured its reversal; Sir J. Hanmer not even appearing to support the decree.

In the Ecclesiastical Courts.

In the Ecclesiastical Courts.—In *Dyke v. Barton* (b), the Crown, by its nominee, the Procurator-General, contested the validity of a will of a bastard in the Prerogative Court, and, on being cast, appealed to the Judicial Committee of the Privy Council. The judgment—which was the judgment of the whole Chamber, delivered by myself—dismissed the appeal *with costs*. Although the statute is not referred to in the judgment itself, it was relied on by the counsel against the Crown.

But for the 18 & 19 Vict. c. 90, costs could not be given against the Crown. The statute only applies to cases in which the Attorney-General or the Lord Advocate is a party to the suit.

The result seems to me to be as follows:—(1) But for the statute the Court could not make a decree against the Crown for costs. (2) That the statute does not extend to this case, because it only applies to cases in which either the Attorney-General or the Lord Advocate is a party to the suit.

No doubt this conclusion is opposed to the case of *Dyke v. Barton*, but as it is impossible to reconcile that case with the express and deliberate judgment of the Court of Queen's Bench in *Reg. v. Beadle*, and as I am not certain that if I decreed costs against the Crown payment could be enforced by the authority of this or of any other Court, I shall abstain from so doubtful a course.

The co-plaintiffs are liable for the whole costs.

But the co-plaintiffs, the commander and crew of the ship, may clearly be condemned in costs. By the practice of the

(a) 4 De G. & J. 205.

(b) 10 Moore, P. C. C. 458.

Court, co-plaintiffs are severally liable; and, in informations before the statute, a relator was added for the express purpose that costs might go with the decree. The injustice of making subordinate parties liable for the whole costs is, after all, only an apparent one; they will no doubt be indemnified by the Admiralty.

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The Queen's Advocate.—After your lordship's judgment, I shall think it right to recommend the Lords of the Admiralty to pay the whole costs of the suit.

DR. LUSHINGTON.—I am sure, Queen's Advocate, in so doing you will be rightly discharging your duty.

Townsend, proctor for the plaintiffs.

Rothery, proctor for the defendants.



THE MARIA DAS DORES.

Evidence—Admissibility of Light-Ship Log on production from the Trinity House.

The Court of Admiralty will admit in evidence a light-ship log, on production by the officer of the Trinity House, in whose custody such logs are kept, without requiring the evidence of the person who made the entries.

THIS cause was brought to recover damages for a collision which had taken place in the Downs, between the Maria das Dores, and the ship of the plaintiffs.

January 22.

Brett, Q.C., and *Clarkson*, for the plaintiffs.

Deane, Q.C., and *Lushington*, for the defendants.

One of the points in controversy was the direction of the wind at the time of the accident; to prove which, on behalf of the plaintiffs was called Mr. MacLean, a clerk of the Trinity House, London, who produced out of his custody the log or journal of the Gull Light-ship. The light-ship keeper who had made the entries in the log was in Court, and was offered as a witness, but the Court said: "Let it be known that this Court

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does not in these cases require the testimony of the light-ship keeper, the person who actually made the entries in the log. These logs are official books, kept under authority, and deposited in official custody. I know that in strictness they are not admissible in evidence *per se*; but this Court, for reasons of public convenience, allows of several relaxations in the rules of evidence observed in the Courts of Common Law (a).”

Clarkson, proctor for the plaintiffs.

Rothery, for the defendants.

THE PHILADELPHIA.

Suits by Rival Salvors—Practice as to Cross-examination.

On suits by rival salvors being heard together, the witnesses called on behalf of one set of salvors will be liable to cross-examination, first on behalf of the rival plaintiffs, and then on behalf of the defendants.

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IN this case two separate suits of salvage were brought on behalf of different parties, for concurrent services rendered to the ship Philadelphia. The two suits came on for examination of witnesses and hearing on the same day.

Brett, Q.C., and *Potter*, for the first set of salvors.

Edward James, Q.C., and *Clarkson*, for the second set of salvors.

Bovill, Q.C., and *Lushington*, for the ship.

After the examination in chief of the first witness called by Mr. Brett, application was made to the Court to determine the course as to cross-examination.

(a) Note.—In a subsequent case the Court said, that in consequence of a representation from the Trinity House of the inconvenience that would be occasioned, if their officer was con-

tinually subpoenaed to attend with the light-ship logs, he should for the future allow such logs to be proved by examined copy. Such accordingly has been the practice since.

DR. LUSHINGTON:—We have here to deal with three parties, two sets of rival salvors, and the owners of the property. The right course, I think, is for Mr. James to cross-examine on behalf of the rival salvors first; and then for Mr. Bovill to cross-examine on behalf of the owners. That course was taken in the case of the *Minnehaha* (a), which went to the Privy Council; and their Lordships appear to have made no objection.

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In the Privy Council.

Present—Lord CHELMSFORD.

Lord Justice KNIGHT BRUCE.

Lord Justice TURNER.

Sir JOHN TAYLOR COLERIDGE.

THE MÆANDER.

THE FLORENCE NIGHTINGALE.

*Collision—Narrow Channel—17 & 18 Vict. c. 104, s. 297—
Costs of Adherence to Appeal—Increase of Action.*

The channel or water between the Bell Beacon and the buoys of the Queen's Channel, leading to the port of Liverpool, is not a "narrow channel" within the meaning of the 297th section of The Merchant Shipping Act, 1854.

An appeal having been adhered to, and the sentence of the Court below being affirmed in all respects, each party was condemned in costs.

The Court of Admiralty will, before the hearing, allow the amount in which the cause was instituted to be increased.

THESE were cross suits in respect of a collision, which took place on the 22nd of February, 1862, between two British ships, at the entrance to the Queen's Channel, which leads to the port of Liverpool. The Mæander was a steamer, inward bound; the Florence Nightingale was in tow of a steam-tug, and was outward bound. Each vessel was in charge of a pilot, employed by compulsion of law. The Mæander was not arrested, but the owners gave an undertaking to answer judgment.

(a) Lushington, p. 335.

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The seaward end of the Queen's Channel lies between the Jordan Flats and the Little Burbo Bank, and is marked out by red buoys on one side (the left-hand side going out), and by black buoys on the other side; the last or outermost buoys lie nearly on the edge of the shoal water, and between them is what may be called the bar. At the distance of about a mile from each of these outermost buoys, and in six fathom water, is a beacon, called the Bell Beacon, from whence ships inward-bound start on their fairway course for the Queen's Channel, and vessels outward-bound divide towards their several destinations.

The collision took place between the Bell Beacon and the buoys, and, as the owners of the Mæander contended, towards the red buoys. It thus became one of the questions in the cause, whether the Florence Nightingale, being in tow of a steam-tug, was not violating the 297th section of the Merchant Shipping Act, 1854, which is as follows:—

“Every steamship, when navigating *any narrow channel*, shall, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such steam-ship.”

There were several other questions involved in the case, which, being altogether or principally questions of fact, it is not necessary to report.

Amount of action increased on application.

On the cause coming on for hearing on the 19th of May, 1862, the Court, on the application of the owners of the Florence Nightingale, allowed their action, which had been instituted in the sum of 2,500*l.*, to be increased to 5,000*l.*

The learned Judge of the Admiralty Court, with the assistance of the Trinity Masters, after hearing all the evidence, held that the Mæander was solely to blame, but for the act of the pilot only. The suit for the owners of the Mæander was thereupon dismissed with costs; and the suit for the owners of the Florence Nightingale dismissed without costs.

Cross appeals were then had (*a*), each party adhering to the the other's appeal.

Brett, Q.C., and *Lushington*, for the owners of the Mæander, contended that looking to the requirements of safe navigation, and giving a reasonable construction to the statute, the *locus in quo* was “a narrow channel.”

Serjeant Shee and *Milward* (*Potter* with them), for the owners of the Florence Nightingale, contended that the Queen's Channel was bounded seawards by the bar.

(*a*) See *Florence Nightingale*, *Lushington's R.* 530.

On the 2nd of February, 1863, the Lord Justice Knight Bruce delivered the judgment of the Committee.—[Having stated that the collision took place “at sea, near Liverpool,” his lordship added]—“Their Lordships desire to say that the expression, ‘at sea,’ just now used, has been used deliberately; for though it was argued that the collision took place in a ‘narrow channel,’ within the meaning of the 297th section of the statute 17 & 18 Vict. c. 104, or so near a ‘narrow channel’ as to bring that section into operation, their Lordships, upon the whole of the evidence, are of opinion, as was the learned Judge of the Admiralty, that the collision did not take place in a ‘narrow channel,’ or in such waters or in such a manner as to bring the 297th section into operation, and that the case is not on one side or the other affected by that section.”—[The judgment then determined the questions of fact, and affirmed the sentence of the Court below in each case in all respects. It then concluded]—“As to the costs of the appeals, we think that each appeal should be dismissed with costs, except only so far as the costs in the appeal of the owners of the *Florence Nightingale* have been increased by the adherence to that appeal by the owners of the *Mæander*. The costs occasioned by that adherence ought, we think, to be paid by the owners of the *Mæander*.”

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Pritchard and Son, proctors for the *Florence Nightingale*.

Jennings and Son for the *Mæander*.



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THE ELLA A. CLARK.

Necessaries—Foreign Ship—Transfer to British Owner—3 & 4 Vict. c. 65, s. 6—and 24 Vict. c. 10, s. 5.

A claim for necessaries supplied to a foreign ship may be enforced by proceedings in rem under the 6th section of the 3 & 4 Vict. c. 65, notwithstanding a subsequent and bonâ fide transfer to a British owner; and this remedy is not taken away by the 5th section of the Admiralty Court Act, 1861, though the British owner be domiciled in England at the time of the institution of the cause.

The 5th section of the Admiralty Court Act, 1861, does not apply to ships foreign-owned at the time when the necessaries were furnished.

Semble.—Where the British Legislature has given the Court of Admiralty jurisdiction to proceed in rem for certain claims, such claims are to be treated as maritime liens.

THIS cause was instituted by Elijah James Croker, of Liverpool, for necessaries there supplied to the Ella A. Clark. The defendant Joseph Greaves appeared under protest, and filed a petition setting forth the following facts :—

The ship, which belonged to one John E. Lyon, of Boston, in America, was purchased by the defendant, who was a merchant domiciled in Liverpool; her name was then changed to the Golden Age, and she was registered in the port of Liverpool, in the name of the defendant as sole owner. After such registration had been effected, the present action was instituted for necessaries supplied by the plaintiff to the ship at Liverpool, whilst she belonged to the said John E. Lyon, who, at the time of the institution of the cause, was domiciled in America. Under these circumstances the defendant submitted that the Court had no jurisdiction under the 5th section of the Admiralty Court Act, 1861, or otherwise, to entertain this cause, for the following reason :—That at the time of the institution of the cause the registered owner of the ship was domiciled in England.

In his answer to the protest, the plaintiff alleged that the Court had jurisdiction by the operation of the statutes 3 & 4 Vict. c. 65, and 24 Vict. c. 10, and otherwise.

The following are the material provisions of those statutes :—

3 & 4 Vict. c. 65, s. 6 : “The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever, in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of

towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished, in respect of which such claim is made."

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24 Vict. c. 10, s. 5. "The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court, that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales, &c."

Section 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

Brett, Q.C., and *Potter*, in support of the protest.—Before the statute 3 & 4 Vict. c. 65, this Court had no jurisdiction over claims for necessities, and the remedy given by that statute created no lien which would follow the ship into the hands of a bonâ fide purchaser. Maritime liens do so follow the ship, as decided in the *Bold Buccleugh* (a); but merely statutory claims in rem do not. In the *Alexander* (b), the Court said "The statute (3 & 4 Vict. c. 65) does not create a lien upon the vessel at all: it simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here; or by arresting the property in case a necessity occurred. The Court having this jurisdiction would be bound to exercise that jurisdiction equitably, and in so doing, it would protect the interest of all persons having a bonâ fide lien upon the property; as, for instance, subsequent purchasers without notice." Again in the *Gustaf* (c): "Claims for necessities do not possess, ab origine, a lien, but carry only a statutory remedy against the res, which is essentially different;" and there the claim for necessities was postponed to the shipwright's lien. The statute does not and cannot constitute a maritime lien; a maritime lien can be given only by the law maritime. Under the 3 & 4 Vict. c. 65, s. 6, then, the Court could not have proceeded against this ship in the hands of the present owner.

(a) 7 Moore, P. C. C. 267. (b) 1 W. Rob. 288, 294. (c) Lushington, 508.

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But at all events that enactment is controlled by the 5th section of the 24 Vict. c. 10. This section speaks of “*any ship*.”—[DR. LUSHINGTON:—In the *St. Cloud* (a), I put a restricted meaning on the term “*any assignee of a bill of lading*.”]—There were special reasons for that construction; and sections 9 and 12, which speak specifically of British ships, show that the words “*any ship*” in the Act include a foreign ship; and in the *St. Cloud* (a), the same words in section 6 were held to include a foreign ship. The present case then falls within the proviso of section 5 of the later statute, because at the time of the institution of the cause the owner of the ship was domiciled in England. We therefore submit that this Court has no jurisdiction.

Milward and Lushington, contra.—We contend that the Court has jurisdiction under the 3 & 4 Vict. c. 65, s. 6. That statute revived the ancient maritime lien, and the lien follows the ship into the hands of a bonâ fide purchaser. The observations cited from the *Alexander* (b), which was the first case on the statute, were alio intuitu, namely, as to vested interests before the passing of the Act. The law is now settled by the *Bold Buccleugh* (c).—[DR. LUSHINGTON:—That was a damage cause.]—The case of the *West Friesland* (d) was one of necessities, and it was there held that the lien followed the ship into the hands of a purchaser. That was a suit instituted under the section on which we rely. But it is said that the 5th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), limits the operation of the former Act. We submit not. Both the title and the preamble of the Admiralty Court Act show that the intention of the legislature was to extend, not to abridge, the jurisdiction of the Court. The 5th section of the Admiralty Court Act, 1861, does not apply to foreign ships. There were cases to which the 6th section of the 3 & 4 Vict. c. 65 did not apply: for instance, the case of ships registered here whose owners were resident abroad, or colonial ships: *Ocean Queen* (e). It was to provide a remedy for persons who supplied necessities to such vessels that the 5th section of the Admiralty Court Act, 1861, was framed. But if that section does apply to foreign ships, then the Court has jurisdiction to entertain this cause thereunder. The proviso as to domicile does not exclude the jurisdiction of the Court from this case, because the words “*any owner or part-owner of the ship*,” mean any owner or part-owner at the time of the supply of the necessities, and not

(a) *Ante*, p. 4.

(b) 1 W. Rob. 294.

(c) 7 Moore, P. C. C. 267.

(d) Swabey, 454.

(e) 1 W. Rob. 457, 460.

at the time of the institution of the cause; in point of fact, an owner who can be sued on the original contract. Otherwise, if the ship was originally foreign, there would be an unreasonable distinction between a British and a foreign purchaser; and if the ship, originally British, was sold to a foreigner, an action in rem might obtain, although the former owner, the principal to the contract, were domiciled here.

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Brett, Q.C., replied.

On the 14th of February DR. LUSHINGTON gave judgment. Judgment.
[After stating the facts as above.]

The question in this case is whether the plaintiff, who furnished necessaries to a foreign ship, can pursue his remedy against the ship after she has been purchased by a British subject domiciled here; purchased, I will assume, *bonâ fide* and without notice.

Before entering with the necessary minuteness into the particular enactments of the statutes referred to, I will state what appears to me to have been the intention of the Legislature in conferring jurisdiction on the Court of Admiralty in the case of necessaries furnished to foreign ships. It was, I apprehend, to render the power of the Court of Admiralty auxiliary to the Courts of Common Law: in other words, to give a remedy by the seizure of the ship, when an action at common law would not be available by reason of the absence from British jurisdiction of the shipowner on whose behalf the necessaries were supplied.

The intention of the Legislature was to give a remedy by the seizure of the vessel where an action at common law is not available.

It is contended that Parliament neither did nor could create a maritime lien; and that, upon a transfer of the ship, no proceeding save for a maritime lien could be had in rem. Now I am aware that in the Courts of the United States a distinction prevails between a maritime lien, strictly so called, and the arrest of the ship for the purpose of compelling an appearance; for instance, those Courts hold that seamen's wages constitute a maritime lien, adhering to the ship; that masters' wages do not constitute a lien, but yet may be sued for in the Court of Admiralty. It is very difficult to ascertain with certainty what were the instance proceedings of our own Court of Admiralty in ancient times, for there were no reports till the present century; and though years back I looked at the Court books, I am not prepared to say that I collected satisfactory information on this subject. Latterly the Court of Admiralty was occupied almost, if not entirely, with causes where the subject-matter constituted, without doubt, a maritime lien, as causes of damage, salvage, and

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When the
Legislature has
given a remedy
in rem, it con-
stitutes a
maritime lien.

bottomry. When the Legislature thought fit to put masters' wages on the same footing as seamen's wages (*a*), they did, as relates to this Court, constitute masters' wages a maritime lien; and looking through the several recent statutes, I am led to the general conclusion that when the Legislature has appointed the proceeding in rem, they intended to give the same remedy as heretofore was in use in this Court in the administration of justice in cases of maritime lien, though no express words may be used to that effect. I am not concerned to say whether the Courts of foreign states would recognize such transactions as the present as carrying a maritime lien: it is sufficient for my judgment if the Legislature has directed me to proceed as in the case of such a lien. It is true that in the case of the *Alexander* (*b*) I am reported to have said that the Act of 3 & 4 Vict. did not create a lien, though it gave a remedy against the ship. I intended to state that there might be a distinction between a provision for proceedings by arrest of the ship and the express creation of a lien, and to leave all such questions open. The case of the *Bold Buccleugh* (*c*), however, renders the discussion of this matter useless.

3 & 4 Vict. c.
65, s. 6, gives
the Court juris-
diction, unless
controlled by
24 Vict. c. 10,
s. 5;

The 6th section of the statute 3 & 4 Vict. c. 65 enacts, that this Court shall have jurisdiction to decide all claims and demands whatsoever for necessities supplied to any foreign ship, and to enforce the payment thereof, whether the ship at the time when the necessities were furnished may have been within the body of a county or upon the high seas. After what I have said, if the present case is to be governed by this statute, it is free from difficulty: the Court has jurisdiction.

but it is not so
controlled.

The argument against the jurisdiction of the Court is, however, mainly founded on the provisions of section 5 of the Admiralty Court Act, 1861, which enacts that the Court shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales. The defendant contends that the words "any owner or part-owner" relate to the words preceding, and mean the owner or part-owner at the time of the institution of the cause, and that the proviso therefore excludes the jurisdiction of the Court from this case; in other words, that the transfer to a British owner now domiciled here ousts the jurisdiction. In construing this enactment, I must bear in min

(*a*) 17 & 18 Vict. c. 104, s. 191.

(*c*) 7 Moore, P. C. C. 267.

(*b*) 1 W. Rob. 288, 294.

that the case of foreign ships had been already provided for by the 3 & 4 Vict. c. 65, and that the sale to a British owner by the foreign owner would not have taken away the remedy thereby given to the person who had furnished the necessaries. Did then the later statute intend to work that effect? I am of opinion that it did not, and for divers reasons. 1stly. The 24 Vict. c. 10 is an enabling statute. 2ndly. I do not find any words directly purporting to alter the provisions of the 3 & 4 Vict. c. 65, as to necessaries furnished to foreign ships. 3rdly. It is not to be presumed that the Legislature, having given a remedy tantamount to the creation of a maritime lien, would, without some strong apparent reason, pass an enactment most materially impairing the efficacy of that remedy. 4thly. I can discover no reason for the distinction between a British and a foreign purchaser. There would be a sound distinction if a personal action would lie against the British purchaser; but it is manifest that there would be no privity between him and the person who furnished the necessaries, to support such an action. 5thly. The construction contended for on the part of the defendant would be against the spirit of the enactment, which is to give a remedy in rem for a just claim where no personal action can be brought. 6thly. The words of the 5th section of the 24 Vict. c. 10 are unfavourable to its application to ships foreign-owned when the necessaries were furnished. The words "owner or part-owner domiciled in England or Wales" appear to me to refer manifestly to ships not foreign-owned when the debt was contracted: for it is improbable that the owner of a ship foreign-owned when the necessaries were supplied should at the time of the institution of the suit be domiciled in England or Wales. Moreover, there is a class of ships upon which the words can with good reason operate, namely, colonial vessels, and vessels registered in Great Britain, whose owners are not resident in England or Wales.

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24 Vict. c. 10,
s. 5, does not
apply to
foreign ships.

I am satisfied that the intention of the Legislature will be best carried out by the interpretation I put on this statute; whereas if I adopted the contrary construction, the just demand of the merchant or trader who furnished necessaries to a foreign ship would at once be defeated by the transfer to an English purchaser domiciled in England. It is no real hardship on the purchaser. Caveat emptor is the true principle; and there is no real reason why this claim for necessaries should not stand on the same footing as a claim for wages or salvage. I overrule the protest with costs.

Protest over-
ruled.

Rothery, proctor for the plaintiff.

Marshall, solicitor for the defendant.

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THE TIGRESS.

Stoppage in Transitu—Liability of Ship for Non-delivery of Cargo—Vendor and Vendee—Conflicting Claims under two Bills of Lading—"Breach of Duty," 24 Vict. c. 10, s. 6.

A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands, for the purpose of stoppage in transitu, in the position of vendor; and the indorsement by him of one bill of lading to the vendee does not, of itself, defeat his right to stop in transitu.

The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of his vendee.

Upon the vendor asserting his right to stop in transitu, the master, unless aware of some legal defeasance of such right, is bound to deliver the goods to him; and his refusal so to deliver constitutes a "breach of duty" within the 6th section of the Admiralty Court Act, 1861, for which the ship will be liable.

A master is justified in delivering goods to the holder of the first bill of lading presented.

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IN this cause the plaintiffs, Messrs. Lucy & Son, of Liverpool, claimed damages for the refusal by the master of the American ship Tigress to deliver to them a cargo of wheat shipped at New York and carried to Bristol. The cause was instituted, and the ship arrested under the Admiralty Court Act, 1861 (*a*), of which the following are the material provisions:—

Section 6. "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales."

Section 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

The petition set forth the following facts:—

On the 3rd July, 1862, the plaintiffs, Liverpool merchants trading under the style of William Lucy & Son, received a letter from one Frederick James, a corn-broker at Bristol, containing the following amongst other orders:—

(*a*) 24 Vict. c. 10.

“John Bush—Bristol—500 quarters Milwaukie club, or other equally good wheat, if at or under 43s. per 480 lbs., including cost and freight.—Shipment to Bristol.”

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In the letter to the plaintiffs Mr. James wrote:—“I shall be glad if you will submit these orders per next mail to New York, subject to my commission as customary.” The limit of 43s. was afterwards extended to 45s. 6d.

The custom of the trade in such transactions is for the Liverpool merchant to forward a corresponding order to his agent at New York, who thereupon executes the same on the best terms he can, charging the Liverpool merchant the cost price and five per cent. commission; but of this five per cent. the Liverpool merchant takes three per cent. for himself in his account with the New York agent, paying thereout one per cent. to the Bristol broker. The Bristol broker's principal pays the Liverpool merchant the cost price of the wheat, the five per cent. commission, and other charges.

The plaintiffs accordingly gave an order to one Power, their agent at New York, for wheat corresponding in quality and price with the order received by them; and Power, in compliance with the order, caused 4,000 bushels of Illinois wheat to be shipped on board the Tigress. Three bills of lading, by which the wheat was made deliverable at Bristol, “unto order or its assigns,” were signed on behalf of the master of the Tigress on the 2nd October. The bills of lading contained the usual proviso, “one being accomplished, the others to stand void.” Power indorsed two of these bills of lading, “Deliver to order of Messrs. William Lucy & Son—Wm. H. Power,” and sent them to the plaintiffs. He also sent to the plaintiffs an invoice of the wheat as “shipped by order of Messrs. William Lucy & Son, of Liverpool,” and an account wherein the plaintiffs were debited with the wheat. Throughout the transaction Power dealt with the plaintiffs only.

On receipt of the bills of lading, on or about the 15th of October, the plaintiffs sent to Bush an invoice of the wheat, “shipped to Bristol from New York per ship Tigress, by order of William Lucy & Son, Liverpool, for account and risk of J. Bush, Esq., Bristol,” and also an account for the same. For the amount of this account, 893*l.* 18s., they at the same time drew on Bush at two months. The bill was accepted by him and returned to the plaintiffs, who thereupon, on the 21st of October forwarded to Bush one of the bills of lading indorsed, “Deliver to John Bush, Esq., or order.—William Lucy & Son.”

The Tigress arrived at Bristol on or about the 18th of November. On the 2nd of December the plaintiffs received a circular,

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calling a meeting of the creditors of Bush, who was then insolvent. Thereupon the plaintiffs indorsed the bill of lading remaining in their hands in blank, and gave it to one Dyson, whom they sent to Bristol to receive the wheat in their name.

Whilst the wheat was still in transitu, and before any other bill of lading in respect of the same had been presented to the master of the *Tigress*, Dyson, on the 3rd of December, presented to the master the bill of lading in his possession, and demanded delivery of the wheat, offering at the same time to pay the freight. He also presented to the master a paper, signed by the plaintiffs, giving him notice that they were the owners of the wheat; that they claimed delivery thereof; that they thereby cancelled any delivery order, actual or constructive, previously given by them; and that he was not to deliver the wheat or any part thereof to any person except Dyson, whose receipt should be a valid discharge for the wheat.

The master refused to deliver the wheat to Dyson. Some negotiations ensued, in the course of which the plaintiffs offered to indemnify the master and owners of the *Tigress* against claims by third persons if the former would deliver the wheat to Dyson. An agreement to this effect was drawn up and tendered to the master. It recited amongst other things that Bush was the holder of one bill of lading, and that he claimed to have and be intitled to the said wheat thereunder. The master nevertheless refused delivery, and this cause was therefore instituted. On the 18th of December, after the commencement of proceedings, the bill of exchange became due, but was not presented for payment by reason of the insolvency of Bush.

The defendant, the managing owner of the *Tigress*, gave notice of motion to reject the petition. The motion now came on for argument.

The two first sections of the Bills of Lading Act (18 & 19 Vict. c. 111) are as follows:—

Section 1. “Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.”

Section 2. “Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the

consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

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Cleasby, Q.C., and *Wambey* for the defendant.—In order to maintain this action, which is instituted under the Admiralty Court Act, 1861 (*a*), the plaintiffs must show that the master of the ship had a duty to deliver the wheat to them. The plaintiffs had no right to delivery in virtue of the bill of lading which they presented; for they themselves had indorsed one of the bills of lading to Bush; and an indorsement of one is an indorsement of all. By such indorsement the contract contained in the bill of lading passed to Bush; 18 & 19 Vict. c. 111; and the presentment of any other bill of lading was inoperative on the master. Secondly; If the plaintiffs rely on a right of stoppage in transitu, then we say that their right to stop in transitu had been defeated by the negotiation of the bill of lading: *Lickbarrow v. Mason* (*b*); *Gurney v. Behrend* (*c*); Smith's Mercantile Law, 5th ed. 532. It is no answer to the defendant that the bill of lading negotiated is still with Bush. And if it were, the petition is defective for not averring that Bush was still, on the 3rd of December, the holder of the bill of lading indorsed to him, and that the plaintiffs then informed the master of that fact. The master, it appears, knew that one bill of lading had been indorsed to Bush: he knew therefore that Bush might assign, and in all probability had assigned it to third persons. Under these circumstances it would have been a breach of duty on his part to have delivered the cargo to the plaintiffs without the bill of lading which had been indorsed to Bush being accounted for. The plaintiffs could not maintain trover at common law; because, having by their own act created an uncertainty as to the person to whom the master ought to deliver the wheat, his holding it until he should be able to ascertain the right person cannot amount to a conversion. He only wanted to do his duty. A difficulty in assessing damages in a case of this kind ought also to be pointed out. Assuming that the plaintiffs had a right to the wheat, the possessory action of trover remains to them with damages to the full value of the property.

Brett, Q.C., and *Lushington*, in support of the petition.—In the 6th section of the Admiralty Court Act the word "owner" means the owner of the goods. As owners of the goods the plaintiffs have a remedy given them by the Act for a breach

(*a*) 24 Vict. c. 10.

(*c*) 3 E. & B. 622, 637.

(*b*) 1 Smith's L. C., 5th ed. 681, 729.

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of duty, or a breach of contract, by the master. It is not necessary that the plaintiffs should show a duty on the part of the master to deliver to them arising out of the contract contained in the bill of lading. There may be a breach of duty on the part of the defendant without a contract, or at all events without a contract by bill of lading. The plaintiffs claim as unpaid vendors to stop the wheat in transitu. As against Bush it is clear that they had this right. In the case of *Feise v. Wray* (a), it was held, that a correspondent who purchases for a merchant on his own credit is so far a vendor that he may stop the goods in transitu. The case of *Bloxam v. Sanders* (b) also shows clearly the principle on which the right to stop is founded. Then, on the demand of delivery by the plaintiffs and the master's refusal, a cause of action accrued to the plaintiffs: *Thompson v. Trail* (c). The defendant complains that he was placed in a difficulty as to the delivery of the cargo; but the difficulty is one common to all carriers, in return for which they have certain common law privileges accorded them. As to the plaintiffs' right to stop in transitu being defeated by the indorsement of one bill of lading to Bush, there is no authority for such an assertion. In the note to *Lickbarrow v. Mason* (d), the words are "The right to stop in transitu may be defeated by negotiating the bill of lading with a bona fide indorsee." But negotiation there means negotiation by the vendee to a third party. No doubt the plaintiffs' right to stop in transitu would have been defeated had Bush indorsed the bill of lading over to a third person for value; but this he had not done. The case of *Gurney v. Behrend* (e) is beside the question, for in that case there was negotiation by the vendee to a third party. The Bills of Lading Act (f) does not help the defendant, because section 2 expressly provides that the Act shall not affect the right of stoppage in transitu. The plaintiffs also claim as presenters of the only bill of lading presented to the master. They were indorsees of the bill of lading and owners of the cargo, and as such might have brought trover, or any action simply depending on their rights as owners of the cargo, before the passing of the Bills of Lading Act.

Cleasby, Q.C., replied.

Cur. adv. vult.

(a) 3 East, 93.

(b) 4 B. & C. 941.

(c) 6 B. & C. 36.

(d) 1 Smith's L. C., 5th ed. 729.

(e) 3 Ell. & B. 622.

(f) 18 & 19 Vict. c. 111.

On the 17th of February DR. LUSHINGTON gave judgment.

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Judgment.

This case comes before the Court on motion to reject the petition filed by the plaintiffs.—[The learned Judge then recited the principal statements in the petition.]—It is in truth a demurrer; and the statement of facts in the petition must therefore, for the present purpose, be taken as true; and the Court must determine whether they disclose a good cause of action. There can, I think, be no doubt that, by the 6th section of the Admiralty Court Act, 1861, this action is maintainable in the Court of Admiralty if it appear that the master had a duty to deliver the wheat as claimed by the plaintiffs.

The action is maintainable under 24 Vict. c. 10, s. 6, if the master had a duty to deliver to plaintiffs.

The defendant objects that whether the plaintiffs found their claim to the wheat on the bill of lading indorsed by themselves in blank, and presented to the master by their agent Dyson, or on their asserted right of stoppage in transitu as unpaid vendors, the master had no duty to deliver to them, and the petition accordingly does not disclose a good cause of action. On the first ground of objection the defendant says that the plaintiffs could not claim the wheat under the bill of lading presented by Dyson, because they had previously indorsed another of the bills of lading to Bush. An indorsement of one bill of lading is, it is contended, an indorsement of all; and therefore the subsequent indorsement of the duplicate bill of lading under which Dyson claimed delivery was ineffectual. I think this argument of the defendant is opposed to the law as laid down in the case of *Fearon v. Bowers* (a). That case is cited with approbation in *Lickbarrow v. Mason*, alike by Lord Loughborough in the Exchequer Chamber, and by Mr. Justice Buller in the House of Lords (b), and in no way infringes the doctrine that the indorsement of a bill of lading may pass the property. There the consignor indorsed one of the bills of lading to the vendee, and another to his own partner with instructions to present it in case the vendee were not solvent. On the arrival of the vessel the consignor's partner did present his bill of lading, and at the same time an indorsee for value of the vendee presented his bill of lading. The master delivered the cargo to the consignor's partner, and thereupon the indorsee for value sued him in detinue. It was held by Chief Justice Lee, that by the usage of trade the master was not bound to inquire into the comparative merit of claims under different bills of lading; but only to deliver the goods upon one of the bills of lading; and he therefore directed

The indorsement of one bill of lading by the vendor to the vendee does not necessarily render a subsequent indorsement of another bill of lading by the vendor ineffectual.

(a) 1 H. Blackstone, 364, in notis;
1 Smith's L. C., 5th ed. p. 705.

(b) 1 Smith's L. C., 5th ed. pp. 705,
714.

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a verdict for the defendant. This case is a stronger one than the present, for here it appears that there had been no presentment at all by the vendee of *his* bill of lading. It is clear therefore that the master would at least have been justified in delivering to the plaintiffs as holders of the first bill of lading presented; and it must be remembered that the bills of lading contain a proviso that the first being accomplished, the others shall stand void. Whether he would, on the same ground, have been bound to deliver to the plaintiffs it is not necessary for me to decide, for it is clear that the use they made of the bill of lading was merely auxiliary to the right, claimed by them, of stoppage in transitu.

Plaintiffs' right to stop in transitu.

The mere indorsement of one bill of lading by the vendor to the vendee does not defeat the vendor's right to stop.

A vendor exercising his right to stop in transitu need not represent to the master that a bill of lading indorsed to the vendee is still in the vendee's hands.

Then as to the plaintiffs' right to stop in transitu, the defendant contends that they had no such right. It was said at the bar that the plaintiffs lost their right from the moment they indorsed the bill of lading to Bush; for "the right to stop is defeated by *negotiating* the bill of lading with a *bonâ fide* indorsee." But in my opinion the indorsement to Bush was no such negotiation as is meant in this passage from Mr. Smith's note (a). If the bill of lading had been indorsed over by Bush to a third party for value, that would have been such a negotiation; but to give the same effect to a mere indorsement by the vendor to the vendee would be, in a large number of cases, to preclude the exercise of the right altogether. The case of *Feise v. Wray* (b) seems to me quite inconsistent with the argument of the defendant. Nor can I accede to the objection, urged by the defendant, that it is necessary for the vendor, in order to exercise his right to stop in transitu, to represent to the master that the bill of lading is still in the hands of the vendee, and that the petition is bad for not containing an averment to this effect. All that is necessary is for the vendor to assert his claim as vendor and owner. Were the vendor, before he could exercise his right of stoppage in transitu, obliged formally to prove his title, that right would be worthless. The validity of a stoppage in transitu depends upon several conditions:—(1) The vendor must be unpaid. (2) The vendee must be insolvent. (3) The vendee must not have indorsed over for value. But for the vendor to prove to the master that all these conditions have been fulfilled would be always difficult, often impossible. For instance, whether the vendor is or is not unpaid may depend upon the balance of a current account; whether the vendee is insolvent

(a) *Leading Cases*, 5th ed. vol. i. p. 729. (b) 3 East, 93.

may not transpire till afterwards (for it is, I conceive, clear law that the right to stop in transitu does not depend upon the vendee having been found insolvent); and lastly, whether the vendee has or has not indorsed the bill of lading over is a matter not within the cognizance of the vendor. The vendor exercises his right of stoppage in transitu at his own peril; and it is incumbent upon the master to give effect to that right so soon as he is satisfied that it is the vendor who claims the goods, unless he (the master) is aware of a legal defeasance of the vendor's claim. The law is thus laid down by Lord Campbell in *Gurney v. Behrend* (a):—"Primâ facie the defendants had a right to stop the wheat on the 2nd of February, for it was still in transitu, and they were unpaid vendors. The onus lies on the plaintiffs to prove that they had become the owners, and that the right to stop in transitu was gone." Moreover, I find that the indemnity offered by the plaintiffs to the master of the vessel, a copy of which is annexed to the petition, recites that Bush is the holder of the bill of lading, and claims the wheat under it; so that in fact the master had full knowledge of the circumstances.

Neither can I attach any weight to the further objection of the defendant, that, assuming that the plaintiffs had a right to stop in transitu, and that they duly asserted that right, yet the master was guilty of no breach of duty in refusing to deliver to them, inasmuch as he was simply retaining the custody of the wheat for the person intitled until it should appear who that person was. An abundance of cases shows that the right to stop in transitu means the right not only to countermand delivery to the vendee, but to order delivery to the vendor. Were it otherwise, the right to stop would be useless, and trade would be impeded. The refusal of the master to deliver upon demand is, in a case like the present, sufficient evidence of conversion: *Wilson v. Anderton* (b). The master may indeed sometimes suffer for an innocent mistake; but he can always protect himself by filing a bill of interpleader in Chancery. This step it is his duty to take if he have any reasonable doubt: *Abbott on Shipping* (c), and the case of *Wilson v. Anderton* cited above. And if the master was bound to deliver the wheat to the plaintiffs, I think his refusal so to do is a breach of his duty within the meaning of the Admiralty Court Act, 1861. I am therefore satisfied that the petition shows such a primâ facie case of breach of duty as to

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Upon the vendor claiming to stop, the master is not intitled to retain the custody of the cargo until he ascertain who is intitled to delivery;

but may protect himself by interpleader bill in Chancery.

(a) 3 Ell. & B. 622, 633.

(b) 1 B. & Ad. 450, 456.

(c) 10th ed. p. 414.

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Motion re-
jected, with
costs.

render the vessel liable in this Court under the 6th and 35th sections of the statute. The motion to reject the petition must be rejected, with costs.

French, proctor for the plaintiffs.

Thomas and *Capes*, proctors for the defendant.

THE ROYALIST.

*Removal of Master for Fraudulent Breach of Trust—17 & 18
Vict. c. 104, s. 240.*

By the 240th section of the Merchant Shipping Act, 1854, the Court of Admiralty has power, on application by owner or part-owner, &c., to remove the master of a ship, if the Court is satisfied that the removal is *necessary*.

Held, that the removal is "necessary," if the master has committed a fraudulent breach of trust against the owners, such as making a payment of 5*l.* on ship's account, and fraudulently claiming 25*l.* of the owners; and the Court will make the order of removal on the application of one part-owner only, notwithstanding another part-owner (the ship's husband) being dissentient.

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THIS was an action brought against Adamson Burnicle, the master of the British barque *Royalist*, by John Baird, a part-owner of the barque; and the decision here reported arose upon a motion on behalf of the defendant, praying the Court to reject the petition filed by the plaintiff.

The petition stated that John Baird, the plaintiff, was the owner of thirty-two sixty-fourth shares of the British barque *Royalist*; that sixteen other shares were owned by William Thompson; that the remaining sixteen shares were owned by Adamson Burnicle, the defendant; and that it had been agreed by deed between the part-owners that Thompson should be ship's husband, and Burnicle should continue master so long as he conducted himself in a steady, sober and upright manner.

The petition then stated that in October, 1862, the barque, whilst on a voyage from Cronstadt to London, got ashore near Donevig, in the kingdom of Norway, and was assisted off by one Christian Hirstondag; that the defendant paid Hirstondag 5*l.* for his services, on condition of obtaining from him a receipt for 25*l.*; and also stated in a letter to the managing owner, and in a letter or report to the North Star Insurance Club, in which the vessel was insured, and again in a protest which he executed

on his return to England, that he had paid 25*l.* for Hirstondag's services; that these statements were false, and were made in order to defraud his co-owners and others.

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The petition then alleged that Thompson was aware of the misconduct of the defendant, but had refused to discharge him as master; and that by reason of the premises, the removal of Burnicle from being master of the barque was necessary.

The prayer was that the Court would remove Burnicle from being master, pursuant to the statute, and condemn him in costs.

The 239th and 240th sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are as follows :—

Section 239. "Any master of or any seaman or apprentice belonging to any British ship, who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall for every such offence be deemed guilty of a misdemeanour."

Section 240. "Any Court having Admiralty jurisdiction in any of Her Majesty's dominions may, upon application by the owner of any ship being within the jurisdiction of such Court, or by the part-owner or consignee, or by the agent of the owner, or by any certificated mate, or by one-third or more of the crew of such ship, and upon proof on oath to the satisfaction of such Court that the removal of the master of such ship is necessary, remove him accordingly; and may also, with the consent of the owner or his agent, or the consignee of the ship, or, if there is no owner or agent of the owner or consignee of the ship within the jurisdiction of the Court, then without such consent, appoint a new master in his stead; and may also make such order, and may require such security in respect of costs in the matter, as it thinks fit."

Middleton in support of the motion.—The Court has power under the 240th section to remove the master, but only if such removal is "necessary." What is "necessary" appears from the preceding section, s. 239; there must be misconduct,

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endangering ship or life or limb; which is not alleged here. The 263rd section, which prescribes the power of Naval Courts abroad, only gives the Naval Court authority to supersede the master, "if unanimous that the safety of the ship or crew, or the interest of the owner, absolutely requires it."

Deane, Q.C., contra.—Where the master is guilty of such fraud as we allege, his removal is "necessary."

Judgment.

DR. LUSHINGTON.—The question for the consideration of the Court is, whether this petition ought to be rejected. The petition is preferred at the instance of the owner of one-half of the barque, and prays the Court to remove the master (who is also part-owner), on account of a fraudulent breach of trust committed by him. The fraudulent breach of trust alleged against the master is, that whereas he had for certain salvage services rendered in Norway paid the sum of 5*l.* only, he wrote to the managing owner and stated in his protest that he had paid 25*l.*, thereby intending to defraud his co-owners. The question is whether that is sufficient ground for the removal of the master. This depends on the 240th section of the Merchant Shipping Act, which gives the Court authority to remove the master upon proof to the satisfaction of the Court that the removal is necessary. Now assuming, as I must assume, that the master committed the fraud alleged, I have no doubt that his removal is necessary; as, if he continued in command of the ship, he would be able to keep on committing fraud. It has been contended that the Court is not at liberty to remove the master, unless he has been guilty of such misconduct as is described in the 239th section. I am, however, clearly of opinion that the section does not fetter the Court at all, and that the petition shows sufficient cause for the removal of the master. I reject the motion.

Burchett, proctor for the plaintiff.

Duncan, solicitor for the defendant.

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THE WILLIAM AND JOHN.

Salvage—Agreement—Jurisdiction of Justices of the Peace—
 17 & 18 Vict. c. 104, s. 460—25 & 26 Vict. c. 63, s. 49.

The Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862, combined, give exclusive jurisdiction to justices of the peace in all cases of salvage, whether rendered within the limits of the United Kingdom or not, in which the sum claimed does not exceed 200*l.*, or in which the value of the property saved does not exceed 1,000*l.*

The words "sum claimed," in s. 460 of the Merchant Shipping Act, 1854, mean sum claimed by the salvors *before* any legal proceedings are taken.

An agreement between the salvors and ship-owner as to remuneration does not give the Court of Admiralty jurisdiction; but may induce the Court to grant a certificate for costs where the suit is duly brought for an amount exceeding 200*l.*, and a smaller sum is decreed to the salvors.

SALVAGE. This case arose upon a protest to the jurisdiction of the Court.

On the 20th October, 1862, the brig William and John was in distress off Great Yarmouth. The life-boat Rescuer, manned by the plaintiffs, put off to her assistance. The plaintiffs at first demanded 200*l.* for any service they might render. This the master of the brig refused to pay. After some discussion, the following paper was signed by him:—

"October 20th.—I hereby agree to pay Charles Salmon the sum of 140*l.*, and his crew of the life-boat, to take the brig William and John into Yarmouth harbour.

"JOHN NUNN.

"JAMES HRAD, witness, the mate."

The plaintiffs performed the service, and on the following day demanded the 140*l.* under the contract. Payment was refused.

On the same day (21st October) the defendants, the owners of the ship, gave notice to the clerk of the justices of the borough of Great Yarmouth and to the plaintiffs, that proceedings were about to be taken by the defendants according to the provisions of the Merchant Shipping Act Amendment Act, 1862. They also by a writing, addressed to the justices' clerk of the borough of Great Yarmouth, named one justice, and gave notice to the plaintiffs to name another, to hear and adjudicate upon the dispute pursuant to the Act of Parliament. The plaintiffs did not name a justice. On the 25th of October, at the instance of the

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defendants, a summons was issued and duly served, calling upon the plaintiffs to appear before the justices on the 29th. The plaintiffs did not appear on the day thus appointed, and an award was then made in due form, by which the justices found that the value of the property saved was 408*l.*, and that the 140*l.* named in the agreement was an exorbitant sum. They awarded 70*l.* salvage, and 4*l.* 14*s.* 1*d.* costs to the present plaintiffs, the salvors.

In the meantime the plaintiffs on the 22nd of October instituted this suit in the Admiralty Court in the sum of 350*l.*, and obtained a warrant, which was executed on the 25th.

The defendants appeared under protest and filed their petition, stating the facts, and alleging that the value of the property saved did not amount to 1,000*l.*; and they submitted that by the operation of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), the Admiralty Court had not jurisdiction.

Section 460 of the Merchant Shipping Act is as follows:—
“ Disputes with respect to salvage arising within the boundaries of the Cinque Ports shall be determined in the manner in which the same have been hitherto determined; but whenever any dispute arises elsewhere in the United Kingdom between the owners of any such ship, boat, cargo, apparel, or wreck as aforesaid, and the salvors, as to the amount of salvage, and the parties to the dispute cannot agree as to the settlement thereof by arbitration or otherwise,

“ Then, *if the sum claimed does not exceed two hundred pounds, such dispute shall be referred to the arbitration* of any two justices of the peace resident as follows; (that is to say)

“ In case of wreck, resident at or near the place where such wreck is found :

“ In case of services rendered to any ship or boat, or to the persons, cargo, or apparel belonging thereto, resident at or near the place where such ship or boat is lying, or at or near the first port or place in the United Kingdom into which such ship or boat is brought after the occurrence of the accident by reason whereof the claim to salvage arises :

“ *But if the sum claimed exceeds two hundred pounds, such dispute may, with the consent of the parties, be referred to the arbitration of such justices as aforesaid, but if they do not consent shall in England be decided by the High Court of Admiralty of England, in Ireland by the*

High Court of Admiralty of Ireland, and in Scotland by the Court of Session; subject to this proviso, that if the claimants in such dispute do not recover in such Court of Admiralty or Court of Session a greater sum than two hundred pounds, they shall not, unless the Court certifies that the case is a fit one to be tried in a Superior Court, recover any costs, charges or expenses incurred by them in the prosecution of their claim:

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“And every dispute with respect to salvage may be heard and adjudicated upon on the application either of the salvor or of the owner of the property salvaged, or of their respective agents.”

The jurisdiction thus given to the justices is extended by the 49th section of the Merchant Shipping Act Amendment Act, 1862, the material parts of which section are:—

“49. The provisions contained in the 8th part of the principal Act for giving summary jurisdiction to two justices in salvage cases, and for preventing unnecessary appeals and litigation in such cases, shall be amended as follows; (that is to say),

“ (1.) Such provision shall extend to all cases in which the value of the property saved does not exceed one thousand pounds, as well as to the cases provided for by the principal Act:

“ (2.) Such provisions shall be held to apply whether the salvage service has been rendered within the limits of the United Kingdom or not:

“ (8.) All the provisions of the principal Act relating to summary proceedings in salvage cases, and to the prevention of unnecessary appeals in such cases, shall, except so far as the same are altered by this Act, extend and apply to all such proceedings, whether under the principal Act or this Act, or both of such Acts.”

The *Queen's Advocate* (Sir R. Phillimore) and *Lushington*, in support of the protest. The jurisdiction of this Court is taken away by the 460th section of the Merchant Shipping Act; for this is a case in which the sum claimed did not exceed 200*l*. The only demand that had been made upon the defendants at the time when they applied to the justices was for 140*l*. That the salvors' suit in this Court for a larger sum than 200*l*. should under such circumstances oust the magistrates of their jurisdiction cannot be seriously maintained. To hold this would be to allow salvors to defeat the object of the Legislature at any time by entering an action for an amount to which they can have

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no pretension. [DR. LUSHINGTON :—This action is entered for 350*l*. What is the meaning of the words in the statute “sum claimed?” Do you say, that when parties have been negotiating beforehand, I am to fish out what the amount of the claim really was?] The words “sum claimed” perhaps found their way into the statute in consequence of the provision in 9 & 10 Vict. c. 99, s. 21, that the salvors should deliver to the master or owner a statement in writing of the amount of salvage claimed. This was repealed by the Merchant Shipping Repeal Act (17 & 18 Vict. c. 120, s. 4); and it is now for the Court in such cases to discover, upon the evidence, what the “sum claimed” really was, that is to say, the sum claimed before reference to the magistrates or proceedings in this Court. Here the sum claimed was 140*l*. only. This being so, the Court of Admiralty has no jurisdiction. The case of the *Leda* (a), determined that in such cases the jurisdiction of this Court was taken away by the statute. That decision was recognised in the subsequent cases of the *Maria Luisa* (b) and the *Argo* (c). The phrase used in the section is “*shall* be referred;” and throughout the statute “*shall*” and “*may*” are used in distinct senses, as forcibly appears in the latter part of this very section.

The defendants also rely on the 49th section of the Merchant Shipping Act Amendment Act, 1862, by which the provisions contained in the principal Act for giving summary jurisdiction in salvage cases to justices are extended “to all cases in which the value of the property saved does not exceed 1,000*l*.” Here the award shows that value to have been only 408*l*. The jurisdiction thus conferred must be exclusive, like the exclusive jurisdiction conferred by the principal Act. To decide that this extended jurisdiction is not also exclusive and compulsory on the parties, would render the Amendment Act nugatory: because, even under the principal Act, any dispute, whatever the amount claimed, might by consent of the parties be referred to the justices. The only point then remaining is, does the agreement make any difference? We submit not. The agreement does not convert the case from being one of salvage into something else. The result of all the cases in this Court is, that the Court deals with such agreements in an equitable manner. The jurisdiction of the magistrates is *ejusdem generis*. And as there are no words in either statute excluding their jurisdiction in cases where an agreement has been entered into between the parties, they have only to exercise that jurisdiction in accordance with the principles recognised in this Court. In wages cases, where

(a) Swabey, 43.

(b) Swabey, 67.

(c) Swabey, 112.

difficult questions on the law of contracts often arise, the magistrates have jurisdiction.

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Deane, Q. C., and *W. G. Harrison*, contrà.—The Court can only adopt one interpretation of the words “sum claimed,” viz., the sum claimed in foro. If that be not the meaning to be attached to those words, what force can they have in this case? There is only one other sum to which it is possible to apply those words, and that is the 140*l.* mentioned in the agreement. But both parties repudiate this amount. Our opponents refuse to pay it; and we, by instituting the present suit for 350*l.*, have asserted that it is not the amount of our claim. It is true we demanded that sum on the day after the services were rendered; but that was to avoid the necessity of proceedings of any sort; and no person is bound by an offer of peace: *The Ulster* (a). Even if the defendants could be allowed to set up the agreement which they have refused to recognise, the magistrates would in that case have no jurisdiction. The terms of the statutes give them no jurisdiction where an agreement exists. The words “dispute as to the amount of salvage” indicate, with sufficient precision, the duty of the justices, which is to assess and award a reasonable amount of salvage in ordinary cases, not to interpret or decide on the effect of a written contract. This Court has already, in the cases of the *Fenix* (b) and the *John* (c), drawn a broad distinction between ordinary cases, and those in which express agreements are entered into between the parties. We admit that in a simple case, where the claim is under 200*l.* and in which no agreement exists, the salvors cannot sue in this Court; but there is no analogy between such a case and the present. Then as to the defendants’ contention which would make the value of the property saved the simple test of exclusive jurisdiction. The interpretation of the 49th section of the Amendment Act contended for by the defendants is irreconcilable with that part of the 460th section of the principal Act, which provides for proceedings in cases where the sum claimed is over 200*l.*, and for depriving the salvors of costs, if they recover a less amount in the Court of Admiralty. The jurisdiction of a Court can only be taken away by express terms; the affirmative terms in the section should be read as directory only: *R. v. The Justices of Leicester* (d).

The *Queen’s Advocate* replied.

(a) Lushington, 424.

(b) Swabey, 13.

(c) Lushington, 11.

(d) 7 B. & C. 6, 12.

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Judgment.

On the 24th of February, DR. LUSHINGTON gave judgment.
[After stating the facts as above.]

Primâ facie it would appear that this Court has jurisdiction; because it had originally jurisdiction over all claims for salvage, and because the suit is brought for a larger sum than 200*l.*, which is the limit of the amount of claim which the magistrates are by virtue of the Merchant Shipping Act authorized to entertain, except by consent of both parties.

17 & 18 Vict.
c. 104, s. 460.

To oust the jurisdiction of this Court under these circumstances the defendants must show that by the provisions of some statute the Court is prohibited from entertaining the suit; and accordingly they undertake so to do by reference to the 460th section of the Merchant Shipping Act, 1854, and also the 49th section of the Amendment Act, 1862. It is not alleged that the jurisdiction is taken away by any direct and express enactment, but that the necessary inference from the provisions of the Acts leads to that conclusion. The question mainly turns upon the construction to be put upon the 460th section of the Merchant Shipping Act, 1854.

I must admit that I did entertain considerable doubt as to the proper meaning to be attached to the words "if the sum claimed does not exceed 200*l.*" My doubt was, whether the claim must be a demand made by salvors antecedently to any suit or proceedings, or whether it must be a claim preferred in some legal proceedings. I was pressed by this difficulty, that in the various loose negotiations which take place in the first instance between salvors and owners or their agents, it would be extremely difficult to ascertain what was the sum really claimed. It is a difficulty inherent in the nature of these transactions—different sums are asked at different times.

The words
"sum claimed"
mean sum
demanded be-
fore legal pro-
ceedings.

Admitting this difficulty, however, I have, upon consideration of the words of the section, come to the conclusion that the claim meant must be a claim antecedent to the proceedings, for the statute enacts that the dispute shall be referred to the justices. In substance this is a direction to refer to a tribunal *after* a claim. The claim must exist *before* the reference. It could not be made in any Court, for the proceedings are to follow, not to precede. The "sum claimed" must therefore mean the sum asked before proceedings.

Whatever may be the difficulty of ascertaining what is the "sum claimed" in some cases, there is none in this. The demand was for 140*l.*, as specified in the agreement.

Where the sum
claimed does
not exceed
200*l.*, the juris-
diction of the

This being so, the next question will be—is the statute imperative, so that the dispute *must* be referred to the justices when the claim does not exceed 200*l.* I really think that this question

is too clear for argument. I have no doubt that the statute is imperative. And if it be imperative to proceed before the justices, this Court is necessarily ousted of its jurisdiction.

I have already said enough to dispose of this case ; but it may be expedient to add that by the statute of 1862, jurisdiction is given to the magistrates when the value of the property saved does not exceed 1,000*l*. This is confessedly the case here. Not only is jurisdiction given to the justices under such circumstances, but a jurisdiction exclusive of that formerly exercised by this Court. The two statutes are now to be read as one, and read thus :—" If the sum claimed does not exceed 200*l*., or if the property saved does not exceed 1,000*l*., such dispute shall be referred to the justices."

It may be convenient to state further how the exclusive jurisdiction of the justices stood under the Merchant Shipping Act, 1854, and how it stands now, with respect to the locality of salvage services. Under the 460th section of the Act of 1854, the justices had exclusive jurisdiction only if the claim did not exceed 200*l*., and the salvage service was performed within the United Kingdom, or within three miles from the shore. Now, by the Act of 1862, they have exclusive jurisdiction wherever the service is performed, if the value of the property saved does not exceed 1,000*l*.

There is one argument which I ought to notice, viz., that, in cases of agreement, the justices are not a competent tribunal. Such is not the case. The effect of an agreement is this only, that where the suit has been rightly commenced in this Court (by reason of the claim being over 200*l*., and the value of the property saved being over 1,000*l*.), and the Court has awarded less than 200*l*., the fact of the agreement may induce the Court to certify that the case was a proper one for a superior tribunal, and to give the salvors costs of which they would otherwise be deprived by the statute.

Lawrie, proctor for the plaintiffs.

Skipwith for the defendants.

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Admiralty Court is taken away.

Further, by 25 & 26 Vict. c. 63, read with the principal Act, the justices have exclusive jurisdiction, if the property saved does not exceed 1,000*l*.

The exclusive jurisdiction of the justices now obtains wherever the salvage service is rendered, if the property saved does not exceed 1,000*l*.

An agreement does not oust the jurisdiction of justices, or give jurisdiction to the Court of Admiralty ;

but may induce this Court to certify for costs.



1863.

April 1.

THE ANDREW WILSON.

Salvage—Appeal from Award of Justices—“Sum in dispute”—
17 & 18 Vict. c. 104, s. 464.

The words “sum in dispute” in the 464th section of the Merchant Shipping Act, 1854, do not mean the sum awarded by the justices and appealed against; and where the only evidence of the sum in dispute is that the salvors claimed before the justices “a certain amount of salvage not exceeding 200*l.*” an appeal from the award of the justices lies to the Admiralty Court.

IN this case two justices at Lowestoft had awarded to certain salvors the sum of 24*l.* for services rendered by them on the 21st of December, 1862. From this award the salvors appealed to the Admiralty Court under the provisions of the Merchant Shipping Act, 1854; the 464th section of which is as follows:—

“If any person is aggrieved by the award made by such justices or such umpire as aforesaid, he may in England appeal to the High Court of Admiralty of England, in Ireland to the High Court of Admiralty of Ireland, and in Scotland to the Court of Session; but no such appeal shall be allowed *unless the sum in dispute exceeds 50*l.**, nor unless within ten days after the date of the award the appellant gives notice to the justices to whom the matter was referred of his intention to appeal, nor unless the appellant proceeds to take out a monition, or to take such other proceedings as, according to the practice of the Court of Appeal, is necessary for the institution of an appeal, within twenty days from the date of the award.”

The proceedings before the magistrates did not disclose that any precise sum had ever been demanded by the salvors. The award recited that services had been rendered, that the salvors “claimed a certain amount of salvage not exceeding 200*l.*,” that a dispute had arisen between the parties, and had been referred to the justices, &c.

The action in the Admiralty Court was entered in the sum of 250*l.*

The Queen’s Advocate (Sir R. Phillimore), on the part of the respondents, submitted that “the sum in dispute” was 24*l.*, the amount awarded; and therefore that the Court had not jurisdiction.

Deane, Q.C., for the appellants.—“The sum in dispute” is

not the amount awarded; otherwise the greater the wrong, the less the chance of remedy. The sum in dispute may be taken to be 200*l.*, the extreme sum which the salvors would have recovered before the magistrates, under section 460.

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DR. LUSHINGTON :—The first question which the Court must decide is, whether the Court has any jurisdiction under the 464th section of the Merchant Shipping Act, 1854, inasmuch as the sum awarded by the justices is only 24*l.* The material words of the section are, “If any person is aggrieved by the award made by such justices or such umpire as aforesaid, he may in England appeal to the High Court of Admiralty of England, but no such appeal shall be allowed unless the sum in dispute exceeds 50*l.*” There undoubtedly is some obscurity in these words, “the sum in dispute;” but I am of opinion that they do not mean the sum awarded by the justices. If the Legislature had so intended merely to refer to the sum awarded by the justices, I cannot but think that the section would have been differently worded, as that no such appeal should be allowed unless the sum awarded should exceed 50*l.* I am of opinion therefore that I am at liberty to review the decision of the magistrates in this case. I am fully sensible of the inconvenience of allowing appeals of this nature; and that it is the duty of the Court not to interfere with the awards of justices, except in extreme cases. Looking, however, to all the circumstances, I am of opinion that the sum of 24*l.* was inadequate; and I shall allow the salvors a further sum of 20*l.* The salvors are intitled to their costs.

Judgment.

In the Privy Council.

Present—SIR EDWARD RYAN.

THE MASTER OF THE ROLLS.

SIR JOHN TAYLOR COLERIDGE.

THE MALVINA.

Collision—Damage to Barge in Body of a County—Jurisdiction
—24 *Vict. c. 10, s. 7.*

By the 24 *Vict. c. 10*, the utmost extent of jurisdiction in causes of collision is given to the High Court of Admiralty.

The Court of Admiralty has by that statute jurisdiction in a case of damage done by a sea-going vessel to a barge within the body of a county.

THE argument and judgment in the Court of Admiralty on the point here decided are reported in Lushington's Reports, page 493. The case was appealed on the question of law and also on the facts.

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Aspinall and *Lushington* for the appellants argued as in the Court below.

Brett, Q. C., and *Pritchard* for the respondent were not called upon to argue the point of law.

On the 13th of April the Master of the Rolls gave judgment.

Judgment.

In this case the *Malvina*, a screw steamer of between 300 and 400 tons burthen, at about half-past 7 o'clock on the evening of the 6th of December, 1861, struck the *Mystery*, a barge laden with sugar, in Blackwall Reach, and sank her.

The proceedings were instituted by the owner of the *Mystery* against the owners of the *Malvina*, on the ground that the collision was occasioned solely by the default of those on board the *Malvina*, for the purpose of obtaining payment of the damages sustained by reason thereof. It was determined by the High Court of Admiralty that the steamer was solely to blame for the collision, that the pilot was to blame, and that those who navigated the steamer were also to blame. In the course of the argument two questions were raised, one of law and one of fact. The point of law, raised by the appellants, was that the Court of Admiralty had no jurisdiction to take cognizance of such a case; but the learned Judge of that Court overruled this objection and held that the 7th section of the 24 Vict. c. 10, which gives the High Court of Admiralty jurisdiction over any claim for damage done by any ship, put an end to the difficulties which might have arisen from the words of the statute 13 Rich. II. c. 5. Their Lordships concurred in this view at the hearing of the case, and did not call on the counsel for the respondent to argue the point, being then, as they now are, clearly of opinion that the words of the 7th section of the 24 Vict. do by express words confer the jurisdiction on the High Court of Admiralty, and that it was the intention of the Legislature, to be gathered from the words and the whole scope of the statute, to give the utmost extent of jurisdiction to that Court in cases of collision.

By 24 Vict. c. 10, the utmost extent of jurisdiction in cases of collision is given to the Court of Admiralty.

The judgment of their Lordships also affirmed the judgment of the Court below on the question of fact, and the appeal was dismissed with costs.

Rothery, proctor for the appellants.

Pritchard for the respondent.



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April 14.

In the High Court of Admiralty.

THE LOUISA.

*Salvage—Jurisdiction—17 & 18 Vict. c. 104, s. 460—"Owners"
 —25 & 26 Vict. c. 63, s. 49—Absolute Appearance.*

Where the value of the property saved does not exceed 1,000*l.*, the Court will, notwithstanding an absolute appearance is given by the defendant, refuse to proceed in the salvage suit, on the ground that the 460th section of the Merchant Shipping Act, and the 49th section of the Amendment Act, prohibit the Court to exercise jurisdiction.

It is immaterial to this question that the party defending is the mortgagee, not the owner of the ship: the word "owners" in 17 & 18 Vict. c. 104, s. 460, if necessary, extends to all persons interested in the property.

THIS was a cause of salvage instituted by certain Hull boatmen against the *Louisa*, to which an absolute appearance had been entered on behalf of William Martin Hare, the mortgagee of the vessel.

In answer to the plaintiffs' petition the defendant pleaded that the property saved did not exceed 1,000*l.* To this a reply was given, alleging no new fact, but submitting that in the circumstances the Court had jurisdiction. Notice of motion was thereupon given to reject the reply.

The question turned upon the construction of 17 & 18 Vict. c. 104, s. 460, and 25 & 26 Vict. c. 63, s. 49, which are printed *ante* (a).

Pritchard, in support of the motion.—The Court has decided in the *William and John* (b), that where the value of the property saved does not exceed 1,000*l.* this Court has not jurisdiction. The appearance being absolute makes no difference: *Ida* (c); *Bilbao* (d).

Tristram, contra.—After absolute appearance the Court will not take cognizance of an objection to the jurisdiction. But here, moreover, the Court has jurisdiction and the magistrates had none; for this is not a dispute between salvors and "the owners" of the property, as described in 17 & 18 Vict. c. 104, s. 460; but a dispute between salvors and a mortgagee; nor would the present defendant have had power under the con-

(a) Page 50.

(b) *Ante*, p. 49.

(c) *Lushington*, 6.

(d) *Lushington*, 149.

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cluding words of the section to make the application to the magistrates, as "owner of the property."

Pritchard replied.

Judgment.

DR. LUSHINGTON:—The reply does not deny the fact that the value of the property saved does not exceed 1,000*l.*; but it is contended on behalf of the plaintiffs, that after an absolute appearance, the objection to the jurisdiction comes too late, and further that in fact the Court has jurisdiction, because the defendant is not the owner but the mortgagee of the ship. Now it is true that in former days, when application was made to a Court of common law for a prohibition to this Court on the ground that it had not jurisdiction, it was sometimes said, Your application comes too late; in fact many nice distinctions were taken at that time, which it is not necessary to enter into now.

But here there is a statute regulating the jurisdiction of this Court in salvage cases, and I am of opinion that whether the appearance is under protest or absolute, I am bound to take notice of the statute, and if the statute forbids me to proceed then I have no discretion. Now I have already decided that the effect of the statute is to forbid the exercise of jurisdiction by this Court in all cases of salvage where the value of the property saved does not exceed 1,000*l.* I do not think this position at all altered by the fact that the party defending this cause is not the owner of the ship, but the mortgagee. If it is necessary to put an interpretation upon the word "owners" in the 460th section of the Merchant Shipping Act, I think it extends to all interested in the property. The reply must be rejected.

Jones, solicitor for the plaintiffs.

Pritchard and Sons, proctors for the defendants.

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THE BAHIA.

24 *Vict. c. 10, s. 7*—*Goods “carried into any Port in England.”*

In the 7th section of the Admiralty Court Act the words “goods carried into any port in England” do not mean “goods *imported* into England” exclusively.

Where therefore the master of a foreign ship having a cargo consigned from New York to Dunkirk in France, put into Ramsgate and landed the cargo, and refused either to carry it on to Dunkirk or to give delivery to the owners at Ramsgate: *Held*, that for such breach of duty by the master the ship could be sued in the Admiralty Court.

THIS was an action by Dumas, Hankey & Co. against the French ship *Bahia*, under the 6th section of the Admiralty Court Act, 1861.

The petition stated that the plaintiffs were the owners of certain corn which was laden on board the *Bahia* at New York under a bill of lading to be delivered at Dunkirk in France; that on the voyage the master put into Ramsgate, and landed the cargo, and refused either to carry on to Dunkirk or to give delivery at Ramsgate.

Notice of motion in objection to this petition was given by the defendant.

The 6th section of the Act 24 *Vict. c. 10*, is as follows:—

“The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any *goods carried into any port in England or Wales* in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part-owner of the ship is domiciled in England or Wales.”

Lushington, in support of the motion.—The Court has not jurisdiction. The *Kasan* (a) decides that the words “any breach of duty” relate back to “goods carried into any port in England or Wales.” Then the words “carried into any port in England or Wales” mean so carried under a contract to that effect; thus the marginal note is, “As to claims for damage to cargo *imported*.” The statute does not apply, where the goods are only incidentally brought into England, as for instance, if a ship outward bound with cargo put back into a British port. The plaintiffs’ proper remedy is in a French Court.

(a) *Ante*, p. 1.

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Clarkson, contra.—The case is evidently within the spirit of the statute ; it is also within the letter of the statute reasonably construed. The goods have been “carried into” a British port. The marginal note is no part of the statute.

Judgment.

DR. LUSHINGTON :—The Court is bound to assume the statements in the petition to be true. Here then is a cargo originally destined to be imported into the port of Dunkirk ; in consequence of accident the ship puts into the port of Ramsgate, and the master refuses to carry on the cargo to Dunkirk or to give delivery at Ramsgate. That this is a great grievance cannot be denied, and the Court ought to give, if necessary, great latitude to the construction of the Act of Parliament in order to extend the remedy to this case. However it appears to me that this section was carefully worded to give the utmost jurisdiction in the matter. It uses the words “carried into any port in England,” and does not use the word “import.” I apprehend the phrase “carried into” was advisedly used instead of the word “import.” Then it goes on, “or for any breach of duty or breach of contract.” Here there is a clear breach of contract and breach of duty. I am of opinion that without any violence of construction the statute applies to this case. I reject the motion with costs.

Clarkson, proctor for the plaintiffs.

Rothery, proctor for the defendant



THE GLENBURN.

Bottomry—Rescinding a Decree made by Consent.

Where the defendant in adequate possession of the facts has given his consent to a decree of the Court, pronouncing for the validity of a bottomry bond, the Court will not rescind the decree, though the facts might possibly raise a valid defence, according to a decision pronounced subsequently to the decree.

IN this case the plaintiffs, Barnckson & Son, sued upon a bottomry bond on the ship Glenburn, her freight and cargo. The bond, which was given at Rio de Janeiro, bore date 29th September, 1862. The date of the institution of the cause was 19th December, 1862. On the 22nd of December an appearance was entered on behalf of the cargo by the owners, and on the 10th of February, 1863, the plaintiffs' petition was filed.

Some correspondence then ensued between Messrs. Pritchard, the proctors for the plaintiffs, and Messrs. Cotterill & Sons, the solicitors for the defendants, the result of which was that on the 2nd of March, 1863, Messrs. Cotterill wrote to Messrs. Pritchard the following letter :—

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“32, Throgmorton Street,
“2 March, 1863.

“Dear Sirs,— “The Glenburn.

“Although there are, we think, circumstances which would justify us in disputing the validity of the bond, yet having regard to the expense which a commission to Rio would involve, we have decided to admit its validity, and to dispute the items in the usual manner before the Registrar.

“Yours truly,
“COTTERILL & SONS.

“To Messrs. Pritchard & Son.”

Thereupon, by consent of the defendants, a decree passed on the 18th of March for the validity of the bond and a reference to the Registrar. The defendants were thereupon furnished with copies of the accounts.

Upon the 31st of March judgment was given in the Admiralty Court in the case of the *Hamburg* (a).

Notice of motion was now given on the part of the defendants to rescind the decree of the 18th of March, and an affidavit was filed by Mr. Cotterill containing the following paragraph :—

“Since the 18th of March, 1863, I have obtained and perused copies of the accounts, and from such perusal, and from the small amount realized by the ship and the very large proportion of the money payable under the said bond, which the defendants, the owners of cargo, would have to contribute, and from the fact of the owners of the cargo not having been communicated with before the bond was made, I am advised and believe that the defendants, the owners of cargo, have a good defence to the cause on the merits.”

Clarkson, in support of the motion.—The decree was a decree by consent only, and it was immediately followed by the judgment in the *Hamburg* (a), which went further in favour of owners of cargo hypothecated than any earlier decision. The consent was therefore given in ignorance of the law, but in ignorance which was excusable, and indeed necessary. The Court has the power to set aside the decree: *Sisted v. Lee* (b).

(a) 3 New Rep. 136.

(b) 1 Salk. 402.

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Pritchard, contra.—The defendants ought not to be allowed to withdraw from their consent made deliberately and with knowledge of the facts. A decree once made is not alterable because the law alters. But the *Hamburg* is expressly founded on the case of the *Bonaparte* (a), decided by the Privy Council.

Judgment.

DR. LUSHINGTON:—This is an application to the Court to direct that the decree of the Court pronouncing for the validity of this bond, which was given with the consent of the owners of the cargo, should be vacated, and that the owners of the cargo should be at liberty to oppose the bond. Now, whether the Court has a right or has not a right to rescind any judgment of this description it will be time to discuss when the Court thinks it expedient that the judgment should be rescinded. Therefore the first consideration is whether the facts and circumstances of the case are such as would induce the Court to desire to recall its decree. Now, if the consent to this judgment in favour of the validity of the bond had been given in excusable ignorance of the facts; if it could be fairly said that the defendants had been misled, the Court, if it had the power to rescind the judgment, would, in the interests of justice, be anxious to do so; but on the present occasion it appears that the plaintiffs filed their petition on the 10th of February, and that the consent of the defendants was given on the 18th March. There was, therefore, ample time for the owners of the cargo to investigate the contents of the bond itself, and to consider the other facts of the case, and they ought to have opposed the bond if they thought fit. They gave their deliberate consent to the bond being pronounced valid, and now, on the statements in this affidavit, I am desired to annul that consent. But the facts appear to me to be such that every one of them might have been known to the defendants before they gave their consent, and that being so, I consider I should be pursuing a very dangerous course indeed if I rescinded this decree. I refuse this motion, and with costs.

Pritchard & Sons, proctors for the plaintiffs.

Cotterill & Sons, solicitors to the defendants.

(a) 8 Moore, P. C. 459.

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THE IDAS.

*Action for an Account between Co-Owners—Ship lost before
 Action brought—24 Vict. c. 10, s. 8—Retrospective Opera-
 tion of Statute.*

Under the 8th section of the Admiralty Court Act, 1861, the Admiralty Court may order an account to be taken between co-owners relating to matters which took place before the date assigned for the Act to come into operation, and relating to a ship lost before the institution of the cause.

THIS was a motion (by way of demurrer) to reject the following petition:—

“ 1. In the year 1858, the plaintiff Daniel Bloxsome Wadley was owner of $\frac{1}{4}$ shares in the barque Idas, which was registered in the port of Bristol. John Gouldar, of Bristol, was the owner of sixteen other shares; and the remaining thirty-two shares were held by the defendant Edward Leader Kendall, shipbroker, of Gloucester.

2. During the years 1858, 1859, 1860 and 1861, the defendant acted as managing owner, and received the earnings and paid the disbursements of the said barque.

3. In the month of January, 1861, the Idas was lost at sea, and the defendant afterwards received the monies payable under certain policies of insurance effected on the ship and the monies payable under a certain policy of insurance for 300*l.* for freight and outfit effected specially to cover the share of the plaintiff and the share of the said John Gouldar.

4. The defendant has rendered to the plaintiff certain accounts of the earnings and disbursements of the Idas during the years aforesaid, and of the application of the proceeds of the said policies of insurance; but the said accounts are incorrect and false.

5. The defendant, though often applied to, has refused to render to the plaintiff true and just accounts relating to the matters aforesaid, and a large sum of money in respect of the same is due and owing from the defendant to the plaintiff.

The plaintiff prays the Right Honourable the Judge to order that an account shall be taken before the Registrar and Merchants of the earnings and disbursements of the said barque during the years aforesaid, and of the application by the de-

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fendant of the proceeds of the said policies of insurance, and to condemn the defendant in the sum found to be due from him to the plaintiff, and in the costs of these proceedings."

The Admiralty Court Act, 1861, 24 Vict. c. 10, "An Act to extend the Jurisdiction and improve the Practice of the High Court of Admiralty," enacts:—

Section 3. "This Act shall come into operation on the 1st day of June, 1861."

Section 8. "The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit."

Section 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

Clarkson, against the petition.—The case is not within the eighth section of the Act, because there is no question between the parties "touching the ownership, possession, employment and earnings" of the ship. And the power to settle accounts is given just as the power to order the sale of the ship, only where such a question arises, and in order to carry out the judgment of the Court on such question. This appears from the language used. The section says, "the Court shall have jurisdiction," &c., and then afterwards "may settle all accounts," &c. The Court has not power to order an account to be taken simpliciter, as here prayed for. That is for the Court of Chancery. But the case also fails because all the matters occurred, and because the ship had ceased to exist, before the date fixed for the Act to come into operation. The section speaks of a "ship registered."

Lushington, contra.—The case is within the terms and the intention of the eighth section of the statute. Those terms evidently purpose to give a large jurisdiction, with all the necessary discretionary powers. Here there are questions touching the ownership and earnings of the ship, which will appear more distinctly when the account is rendered by the defendant.

The plaintiff prays such an account, which is absolutely necessary to do justice between the parties. Such an account may very properly be taken before the Registrar and Merchants, as in cases of bottomry, wages, &c. With respect to other sections, the Court has held that the statute being remedial is so far retrospective as to operate upon all cases brought before it subsequent to the date assigned for the Act coming into operation. Thus the sixth section, *Ironsides* (a); the thirty-fourth section, *Cameo* (b); the tenth section, *Gananoque* (c). The same reasons apply to the eighth section.

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Clarkson replied.

On the 21st of April Dr. LUSHINGTON gave judgment:—

This is a question as to the construction of the eighth section of the Admiralty Court Act, 1861. The Court will be careful not to exceed the jurisdiction conferred upon it; and, on the other hand, the Court is bound not to decline any duty which the legislature may have imposed. Judgment.

The question arises upon the following facts as stated in the petition:—There were several part-owners of the vessel; the plaintiff was part-owner, so also was the defendant, and the defendant was ship's husband. The ship was lost in January, 1861. Certain accounts were rendered, but the plaintiff alleges that those accounts were incorrect and false; and he claims the aid of this Court to obtain an investigation and settlement of the accounts.

On the part of the defendant several arguments have been offered against the right of the Court to exercise jurisdiction in this case. In the first place it is said that the section is not retrospective, and has no operation upon any transaction which took place before the 1st of June, 1861, the date appointed for the Act to come into operation. The same objection has been urged against the Court proceeding upon several other sections of this statute,—unsuccessfully, and I think it cannot be maintained as to the section now under consideration; but it is unnecessary to repeat the reasons which I have given on former occasions, beyond saying that I consider this statute to be remedial and intended to supply an existing want of effectual jurisdiction. The eighth section of the Admiralty Court Act applies to matters which took place before the time appointed for the Act to come into operation.

The next objection is founded upon the fact that the ship was lost in January, 1861. It is said that the section applies only to ships registered in England or Wales, and this ship having been The loss of the ship before the institution of the cause is

(a) Lushington, 458.

(c) Lushington, 448.

(b) Lushington, 408.

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immaterial
to the question
of jurisdic-
tion.

lost, was not a ship so registered at the time of the institution of the cause. I consider, however, that the words "registered in any port in England or Wales" are intended to designate the description of the vessel, not to import its existence at the time of legal proceedings. It is true that in a subsequent part of the section it is provided that the Court may direct the ship or any share of it to be sold, and that such provision taken alone might seem to point to a ship in existence, but this is qualified by what follows, "and may make such order in the premises as shall to it seem fit." I am of opinion, therefore, that the existence of the vessel is not essential to give the Court jurisdiction. The last section of the Act gives power to the Court to proceed either in rem or personam, which provision meets this case as well as many others.

The Court will
entertain a suit
for an account
only.

Thirdly, it is contended that the section does not confer on the Court any jurisdiction to entertain a suit *for an account only*. The words of the section are these :—"The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit."

In construing this section little assistance can be obtained from a consideration of the jurisdiction formerly exercised by this Court. Whatever may have been the original jurisdiction of the Court, it had long ceased to entertain questions of mere title to ships; but in cases of possession questions of title were continually involved, and, since the 3 & 4 Vict. c. 65, were disposed of by the express authority of that statute. With respect to the employment of ships, all that this Court could do was, if the majority of the owners determined to send the ship to sea, to require them to give security to the minority to the extent of their shares for its safe return. As to the earnings of the ship taken simply, the Court had no jurisdiction at all. Such was the former state of the law; but I repeat that it furnishes no guide for the interpretation of this section. If, however, I rightly understand the argument of the defendant for a limited construction, it is this, that the Court has not by virtue of the section authority to take any accounts save in cases of disputed ownership, possession or employment. Now this construction, arbitrarily and without reason, strikes out of the statute the word "earnings," and there is no explanation suggested how the Court

could deal with the earnings of the ship without taking an account. The defendant then objects that by the more extensive construction this Court would be exercising a jurisdiction belonging to a Court of Equity. The fact is true, but it is equally true of the limited construction, as, for instance, if an account were taken in a cause of possession. It is not and cannot be denied that, to a certain extent, authority to take accounts has been conferred: the only question is to what extent? I am of opinion that I have jurisdiction by the Act to order this account. Reasons might be given in support of this construction, but I need not look for motives when the words of the Act are plain. I reject the motion, with costs.

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Cotterill and Sons, solicitors for the plaintiff.

Clarkson and Son, proctors for the defendant.

THE CHAMPION.

Salvage—Derelict—Possessory Right of Salvors—Right of Master.

In the case of a derelict, the salvors have a right to exclusive possession of the vessel; but unless the vessel has been utterly abandoned, and is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master, on his appearing and claiming charge; and the master may then refuse to continue to employ them, and may employ others, and may take what measures he thinks fit for the preservation of the vessel.

A vessel having run on shore, and been got off water-logged and disabled, was anchored, and the master then quitted with all his crew, to obtain steam assistance. On the next day he returned with a steamer, and found that salvors had just taken possession. *Held*, that the vessel was not a derelict, and that the master was intitled to resume full authority.

SALVAGE. This was a cause of salvage brought against the brig *Champion* on behalf of the owners, master and crew of the *Prince of Wales* steam-tug.

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The circumstances of the case were as follow:—

On the 19th of December, 1862, the *Champion*, then on a voyage from Miramichi with deals to Liverpool, struck on the Skerweather Sands in Swansea Bay. She lay on the sands, striking heavily, till the morning of the 20th, when she was got off, water-logged. Her two anchors were then let go, and her foremast was cut away, to prevent her driving. About 10 a.m. of that day the Porthcawl lifeboat came alongside and took the

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master and all the crew of the *Champion* on shore to Porthcawl. The intention of the master was to procure a steam-tug as soon as possible and return, and he accordingly procured a horse and cart and went to Port Talbot, and there engaged the steam-tug *Donna* to go out as soon as practicable and take the brigantine into Swansea. About 6.15 a.m. of the next day, the 21st of December, the *Donna* started with the master of the *Champion* on board. On nearing the brigantine, and about twenty minutes before reaching her, they observed the steam-tug *Prince of Wales* approaching her, and thereupon hoisted a burgee indicating their number. The *Prince of Wales* was on a voyage from Bristol to Swansea, and was making for the *Champion*, which they had observed to be a vessel in distress, in order to render assistance. The *Prince of Wales* reached the *Champion* first, and sent some men on board. In a few minutes afterwards the master of the *Champion* himself boarded from the *Donna*, and claimed to take possession as master, saying that the *Donna*, and not the *Prince of Wales*, was to tow the vessel to Swansea. The master and crew of the *Prince of Wales* refused to accede to this, and insisted that the vessel was in their possession and their charge. The master of the *Champion* thereupon ordered the *Donna* to go and bring off the crew from the shore. The *Donna* went accordingly. On the way she met the crew and some pilots and coastguardmen coming off, and returned with them to the *Champion*. The crew of the *Prince of Wales*, who had meanwhile begun to weigh the anchors, were then compelled by force to give up charge, and they all, except the mate and two men, returned to their own vessel. The *Donna* towed the brigantine into Swansea, and on the 3rd of March the Court awarded to her owners and crew the sum of 250*l.* as salvage.

The present action was instituted in the sum of 2,000*l.* The value of the property was only 1,300*l.*

Deane, Q.C., and *Tristram* for the plaintiffs, argued that the plaintiffs were in lawful possession, as salvors of a derelict; that they had a right to exclusive possession, and were unlawfully deprived of their charge. They referred to *The Dantzic Packet* (a); and *Coromandel* (b).

The Queen's Advocate (Sir R. Phillimore) and *Clarkson* for the defendants, argued that the vessel never was derelict; that the master's charge was never divested, and that the plaintiffs were altogether wrong in refusing to submit to him.

(a) 3 Hag. 385.

(b) Swabey, 205.

DR. LUSHINGTON.—The services which are stated to have been actually performed by the plaintiffs are so very slight that it is exceedingly difficult to describe them, and the only ground on which this action can be supported is, that the crew of the Prince of Wales were illegally dispossessed of the vessel, being salvors in possession. Now, if this be true, then the plaintiffs might be intitled to say, "Though the salvage service was in fact performed by others, yet, but for your wrong, it would have been performed by us, and we are intitled to remuneration."

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Judgment.

The question resolves itself into this, whether the brigantine was or was not a legal derelict. In the case of a derelict the salvor who gets possession may have a right to keep exclusive possession, and if he can to carry the vessel into port; but unless the vessel has been utterly abandoned, and is according to the legal meaning of the word a derelict, the occupying salvor is bound to submit to the orders of the master, when the master appears and claims his authority. I do not mean to dispute at all the doctrine which has so often been laid down, that where there is a set of salvors who are in actual possession of a vessel found derelict, or who are with the consent of the master holding actual possession of a vessel, they cannot be extruded by other persons strangers to the vessel. That is indisputable; but as between the master and salvors, unless the vessel is absolutely derelict, and the master's authority at an end, he is intitled to resume charge of the ship, to employ whom he pleases, and to take what measures he thinks proper for the preservation of the ship. The occupying salvors are intitled to reward for the services they have actually rendered, but no more.

Unless the vessel is absolutely derelict, the master may resume authority, and the salvors are bound to submit.

Was then this vessel a legal derelict? It was not. Admit the vessel to have been in great danger; still the master left with the distinct intention and purpose to obtain steam assistance and return to the ship. This forms a great distinction between this case and the *Coromandel* (a). There the master quitted the vessel for his life, having only a vague general intention "If I have opportunity, I shall of course procure a tug;" which it is true he afterwards did; but here the very object of the master in quitting the vessel was that he might go to a specified port, and obtain a steam-tug to render the necessary assistance; and he states, with respect to the crew, that their departure was not caused by any immediate danger, but because he thought that, danger apart, it was prudent they should leave, as the vessel was water-logged, and in a condition of utter discomfort. This vessel then was no derelict; the master left *animo revertendi*

Here the vessel was not derelict.

(a) Swabey, 208.

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et recuperandi; and this purpose he did his best to fulfil; the delay in his return was purely accidental.

Action dismissed, with costs.

Now, no doubt the master of the Prince of Wales is intitled to credit for going out of his course to assist a ship in distress, and for sending his men on board. Their possession was lawful possession in one sense, I admit; but it was not possession, such as to exclude the master from returning to his duties and his powers; it was not such as to intitle the plaintiffs, when he came on board, to defy his authority. It would be a dangerous doctrine, and one quite unfounded in law, that where the actual possession of the ship by the true owner is intermitted, the first comer may seize possession and say "I am salvor in possession of the vessel, and I will have charge." Yet it is clear that the plaintiffs in this case acted on this mistaken notion of the law. The result is that their conduct in resisting the master was wholly unjustifiable. Further, they rendered no services to the ship; and further I must agree with the Queen's Advocate that to enter this action in the sum of 2,000*l.* was an abuse of the power of this Court. I pronounce against the claim, with costs.

Felder, proctor for the plaintiffs.

Stokes, proctor for the defendants.



THE GEM OF THE NITH.

Bottomry—Proceedings by Default—Cargo sold Abroad by Master—Freight—Right to demand Reference.

The holder of a bottomry bond on ship, freight and cargo, is, upon the conclusion of proceedings by default against ship and freight, intitled as of course to have the full freight due upon delivery of the cargo paid to him, to satisfy the sum secured by the bond with costs; and the owner of the cargo who has paid the freight into Court is not intitled to a reference of the amount due on the bond, notwithstanding that before the execution of the bond part of his cargo was sold by the master, and the proceeds applied to ship's expenses.

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THIS was a cause of bottomry against the ship Gem of the Nith, her freight and cargo. Proceedings went against the ship by default, and the Court accordingly made the usual decree for the validity of the bond against ship and freight. The ship was sold, and the net proceeds, amounting to 2,578*l.* 2*s.* 8*d.*, were paid out to the bondholder in part satisfaction of the bond, leaving a balance due, according to the tenor of the bond, of 489*l.* 11*s.* 6*d.*, which, with interest and costs, would exceed the

sum of 527*l.* 4*s.* 10*d.* hereinafter mentioned. The cargo, which had been arrested, was released on a bail-bond to answer judgment as against the cargo, and upon payment into Court of 527*l.* 4*s.* 10*d.*, the net freight due for the transportation of the cargo actually delivered. Upon the plaintiff making application to have this sum paid out to him, objection was made by Mr. Hamilton, the owner of the cargo, who was thereupon ordered to bring in a petition. The petition stated that during the voyage, and before giving the bond, the master had sold a portion of the cargo, and had applied the proceeds, 535*l.* 16*s.* 2*d.*, to the benefit of the owners of the ship, and prayed the Court to refer the bottomry bond, with the accounts and vouchers, to the Registrar and Merchants, to report the amount due thereon.

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The answer brought in by the bondholder set out the facts as above, including the sale of part cargo by the master, and prayed the Court to order the sum of 527*l.* 4*s.* 10*d.*, lying in the registry, to be paid out to the plaintiff.

The defendants gave notice of motion to reject this answer.

Manisty, Q.C., and *Wambey*, in support of the demurrer.—It may be doubtful whether the owner of the cargo may deduct from freight the value of that portion of the cargo which was sold abroad: *Campbell v. Thomson* (a); *Salacia* (b): he would certainly, however, have a right of action against the shipowner; and we ask, as a simple matter of equity, that this sum in the registry should not be paid out to the bondholder until he has proved that he is intitled to receive it, on a reference of the accounts to the Registrar. The shipowner might, if he chose, pray such a reference, which would be granted in ordinary course; and the owner of the cargo ought to stand, for this purpose, in the like position.

Brett, Q.C., and *Lushington*, contra.—The Court has already pronounced for the validity of the bond against the freight, and as the shipowner, who alone has an interest in the freight, does not oppose, the bondholder is intitled, as in ordinary course, to receive it without further proof. The owner of the cargo has no right or interest in the freight lying in the registry. Without paying it absolutely he could not have got his cargo. His claim in respect of cargo sold by the master gives him a right of action against the shipowner, but it does not reduce the amount of freight. That has been decided in the *Salacia* (b), which overruled *Campbell v. Thomson* (a). The owner of the cargo has

(a) 1 Starkie, 490.

(b) Lushington's Rep. 578.

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therefore no *locus standi* to pray a reference. In the case of the *Lord Cochrane* (a), where the owners of the cargo were opposing the validity of the bond altogether, the Court ordered the payment of the freight to the bondholder, and as a matter of course.

Manisty replied.

Judgment.

DR. LUSHINGTON.—The real question arising on this demurrer is whether the bondholder is intitled to have the freight now lying in the registry paid out to him immediately, or whether Mr. Hamilton, as owner of the cargo and payer of the freight, has a right to insist upon reference of the bond, with the accounts, to the Registrar and Merchants; and the bondholder, whose bond has been decreed valid against freight, has a right, and a right as of course, to the freight, unless some person showing an interest in the freight prays a reference. I cannot grant a reference on the application of any one who has not an interest in the fund itself. It is quite clear that a mere personal creditor of the shipowner has no right to intervene.

The claim for a reference put forward by the owner of cargo appears to rest upon the fact that the master sold part of the cargo, and applied the proceeds to the ship's use. Now, this may give a right of action against the shipowner, or a right of set-off against an action for the freight; but it does not form a deduction from the freight. The owner of the cargo is not intitled to delivery without payment of the full freight without deduction, and the bondholder, as decided in the *Salacia* (b), has for his security the entire freight which is due upon such delivery. The owner of the cargo has paid the freight into Court, and obtained possession of his cargo, and he has now no right or interest remaining in the freight; and I am therefore of opinion that he is not intitled to demand a reference of the bond. I consider that the answer is good, and the petition *felo de se*. The motion must be rejected with costs.

Manisty applied for leave to appeal.

DR. LUSHINGTON.—I have the power, but I do not give leave.

Jennings & Son, proctors for the bondholder.

Deacon, proctor for the owner of cargo.

(a) 1 W. Rob. 315.

(b) Lushington, 578.

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THE PRINCESS CHARLOTTE.

Proof of Ship's Nationality—Register—17 & 18 Vict. c. 104, s. 107.

A ship's register, containing a statement of British ownership, even if by the 107th section of the Merchant Shipping Act, 1854, made *prima facie* proof of such ownership, may be outweighed by circumstantial evidence to the contrary.

Sembla.—The section does not make the register *prima facie* proof of disputed British nationality.

THE plaintiffs, Thomson, Watson & Co., merchants of Cape Town, at the Cape of Good Hope, sued the ship Princess Charlotte for necessaries supplied to that ship at Cape Town, in February, 1859. The cause was instituted on the 29th of October, 1861.

The defendant, Jonathan Dorning, a shipowner of Liverpool, entered an appearance to the cause under protest to the jurisdiction of the Court, and filed a petition, wherein he alleged, that at the date of the necessaries being supplied, the Princess Charlotte was duly registered in a British port, in the name of Arthur Smith Owen, as sole owner, and was sailing under the British flag; and that at the date of the institution of the cause the defendant, the then sole owner of the ship, was domiciled in England.

The answer of the plaintiffs to this petition alleged that at the date of the necessaries being supplied the true and beneficial owners of the Princess Charlotte were a certain foreign company called the Belgian Transatlantic Steam Navigation Company, and that the ship had been colourably registered with the name of Owen as owner, in order to obtain a charter to carry British troops to India. The petition then alleged that the Court of Admiralty had jurisdiction over the case by the 6th section of the 3 & 4 Vict. c. 65.

Upon the hearing of the cause on protest witnesses were called on behalf of the defendant, and upon their evidence and the admissions in the pleadings, the following facts appeared:—The ship was originally built at Amsterdam, was the property of the Belgian Company and was then called the Constitution. Shortly before the 18th of September, 1857, the ship was tendered, apparently under the British name of the Princess Charlotte, to the East India Company in London, for a charter to carry British troops to India. Some objection was made on behalf of the

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East India Company that the ship was not British, but belonged to a Belgian company; but the ship was finally accepted as a British ship, apparently on the faith of Lloyd's Register, and on the 18th of September, 1857, was chartered to the East India Company. At the same time two other ships, called the Southampton and the Leopold, were, after a similar difficulty had arisen and been disposed of in the same way, also taken up by the East India Company for the same purpose.

On the 10th of October, 1857, the Princess Charlotte was registered in the port of London in the name of Arthur Smith Owen, as sole owner. On the 14th of October, 1857, the ship was mortgaged in the sum of 55,000*l.* to Bernard Joseph Posmo, of Antwerp, who was a large shareholder in the Belgian company. This mortgage, which was registered the same day as made, was, on the 22nd of December, 1857, discharged, and the same day the ship was mortgaged for 45,000*l.* to Jacob Fuchs, merchant, and Charles Verhoustracken, both of Antwerp, who, in fact, represented the Bank of Antwerp, who were the creditors of the Belgian company. On the 24th of December, 1857, the ship was re-mortgaged for 55,000*l.* to Bernard Posmo aforesaid, and François Emile Vander Elst, of Brussels, who was one of the directors of the Belgian company. No further alteration took place in the register until the register was closed on the 5th of March, 1859, when the ship was on her voyage from the Cape of Good Hope to England. The following was the entry on the register, copy of which was put in by the defendant:—

“Registry closed on advice, dated 5th March, 1859, from owner to persons not qualified to own British shipping. Certificate of registry at sea with vessel, and to be given up on return.

“G. EVANS,

“P. Registrar of Ships.”

5/3/59.

The Princess Charlotte, so chartered, sailed to India under the command of Captain Pougin, an Antwerp man, and in the month of February, 1859, being then on a return voyage from China to England with British troops, put into the port of Cape Town, and the plaintiffs then supplied the ship with coals and necessaries to the amount of 1,210*l.* 0*s.* 5*d.* To pay for these necessaries, Captain Pougin, the master of the Princess Charlotte, gave the plaintiffs a draft for the said sum of 1,210*l.* 0*s.* 5*d.* upon the Belgian company, “the amount to be placed with or without further advice to account of the S. S. Princess Charlotte.” And on the 30th March, 1859, this draft was accepted on behalf of the company, payable at sixty days.

In April, 1859, the ship arrived in England from the Cape of Good Hope, and the port charges, wages of the crew and other disbursements of the ship to the extent of 3,918*l.* were met by the Belgian company, by means of a credit on their behalf issued to that effect by the Bank of Antwerp upon Messrs. N. M. Rothschild and Sons, London. The ship then returned to Antwerp.

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The draft, on due presentment for payment on the 1st of June, 1859, was dishonoured. The ship, having returned to Antwerp, remained in dock there from the 16th of May, 1859, to the 15th of September, 1861, owing to the bankruptcy of the Belgian company. On the 24th of August, 1861, the ship was sold, together with the ships hereinbefore mentioned, the Leopold and the Southampton, by the liquidators of the Belgian company to the defendant, who was then told by them that the Princess Charlotte had been working for some years for the Belgian company, and had carried troops to India for the East India Company during the mutiny.

It was obtained from one of the witnesses for the defendant, on cross-examination, that Mr. Arthur Smith Owen, in whose name the ship had been registered, was in Court. He was not, however, called as a witness.

The 107th section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), is as follows:—

“ Every register of, or declaration made in pursuance of the second part of this Act in respect of, any British ship may be proved in any court of justice, or before any person having by law, or by consent of parties, authority to receive evidence, either by the production of the original, or by an examined copy thereof, or by a copy thereof, purporting to be certified under the hand of the registrar or other person having the charge of the original; which certified copies he is hereby required to furnish to any person applying at a reasonable time for the same, upon payment of one shilling for each such certified copy; and every such register or copy of a register, and also every certificate of registry of any British ship, purporting to be signed by the registrar or other proper officer, shall be received in evidence in any court of justice, or before any person having by law, or by consent of parties, authority to receive evidence, as *primâ facie* proof of all the matters contained or recited in such register when the register or such copy is produced, and of all the matters contained in or endorsed on such certificate of registry, and purporting to be authenticated by the signature of a registrar, when such certificate is produced.”

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Deane, Q. C. (*Wambey* with him), in support of the protest.—We rely on the register, which is made by the statute *primâ facie* proof of ownership, and there is no evidence directly contradicting it. The Court will not presume that a fraud was committed upon the East India Company, and upon the statute; that Mr. Owen was guilty of a misdemeanor, and that the ship was liable to be forfeited, 17 & 18 Vict. c. 104, s. 103.

Brett, Q. C. (*Lushington* with him).—Section 107 does not apply at all. It expressly applies only to registers in respect of “*British ships* ;” before it can be applied there must be an admission, or else some satisfactory evidence must be given, that the ship is British. The register may prove everything but nationality. But at any rate the register is only *primâ facie* proof, and any inference from the statement in this register of British ownership is entirely displaced by the other evidence.

Judgment.

DR. LUSHINGTON, in the course of his judgment, said :—The question for me now to decide is, whether this vessel at the time of the necessities being furnished was a British or a foreign ship. The defendant relies on the British register. The plaintiffs say that the register was improperly obtained, and that the ship was really the property of the Belgian Company. Now it is proper to observe that provisions are made by the legislature in the second part of the Merchant Shipping Act for the purpose of preventing ships, which are the property of foreigners, from being registered as British ships. Thus the 18th section begins, “No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description, that is to say, &c.” Unless therefore this ship belonged at the time in question to owners falling within the limitation which follows in this section, the register obtained is both false and fraudulent, and is no better than waste paper. It has frequently happened in my experience that both registers and ships’ papers have been used for the purpose of claiming a particular national character for a ship. The principle upon which we always proceeded was to endeavour by every description of legitimate evidence to ascertain whether the ship was truly intitled to that national character, or whether it was a mere pretence, carried out by the adoption of a piece of bunting the vessel was not intitled to, and by papers which did not contain the truth. We never considered, in all the cases I remember, that all question of the ship’s nationality was set at rest merely because the papers and the bunting were *primâ facie* evidence of national character. I apprehend therefore that I ought, in the first instance, to be

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satisfied in my own mind that the ship was one of those vessels to which it was intended to apply the regulations contained in the Act, including section 107 : and if I should be of opinion that in point of fact, from the circumstances which appear here in evidence, the ship was not a British ship, then I should come to the conclusion that that section, on which so much reliance has been placed, could not apply at all to the present case. The register would not be a register "made in pursuance of" the Act, nor would it be made "in respect of a British ship." I do not, however, mean to found my judgment on that, but to accept the register as *primâ facie* proof of the matters recited in it.

This register states the name, residence and description of the owner, "Arthur Smith Owen, of 16, St. Mary Axe, in the City of London ; sixty-four shares;" and of these facts I accept it as *primâ facie* proof. But if *primâ facie* proof of these facts, it is also *primâ facie* proof of that which is stated on the other side of the register, of the fact that on the 14th of October, 1857, this vessel was mortgaged for 55,000*l.*, and interest at five per cent. Now if there was that mortgage for 55,000*l.*, it is the strongest evidence to me that the transfer was colourable ; that the vessel was nominally transferred into the name of Arthur Smith Owen for the purpose of carrying out the charter, whilst the mortgage was taken for the purpose of controlling the power placed in his hands. All the other circumstances of the case, and especially the not calling of Mr. Owen, point to the same conclusion, and leave no doubt on my mind that the true owners of the ship were the Belgian company. I am not bound to take that as proof conclusive which the statute only says shall be *primâ facie* proof. I decide that the defendant has failed to establish his protest, and I overrule the protest, with costs.

Rothery, proctor for the plaintiffs.

Holt, proctor for the defendant.



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THE PERICLES.

Salvage—Contract to tow—Risk to Tug.

A tug engaged under the ordinary contract to tow, may, by the performance of substantial salvage services in saving the ship towed from supervening danger, earn salvage reward, though not herself incurring risk.

THIS was a cause of salvage instituted by the Liverpool Steam Tug Company for services rendered to the ship *Pericles* by two steam-tugs, called the *Blazer* and the *Scout*.

The circumstances were as follow :—About 2 p.m. of the 13th October, 1862, the *Blazer* was engaged under the ordinary contract to tow the *Pericles*, a large inward-bound ship, up the Mersey and dock her, for 15*l.*, provided she docked that tide ; if not that tide, then 3*l.* extra was to be paid. Shortly before the turn of high water of the same tide, the *Blazer* brought the *Pericles* into the entrance to the Canning basin, but the vessel stuck in the entrance, and it became necessary to tow her out again. In the attempt to do so, the *Blazer's* rope broke, and as the tide was falling, and the ship was jammed in the entrance of the dock, the ship was in a condition of considerable danger. Several tugs made fast to the ship. Eventually the *Blazer*, with her own hawser, assisted and held in position by the *Scout*, succeeded in towing the ship out.

Brett, Q. C. (*Lushington* with him), for the plaintiffs.—The ship was in great danger, and was rescued by the tugs. As to the *Blazer*, the towage was converted into salvage ; the service of the *Scout* was wholly salvage.

Milward (*Clarkson* with him) for the defendants.—The services of the *Blazer* were within the towage contract. The tug incurred no risk, and risk to the tug herself is, according to the judgment of the Privy Council in the *Minnehaha* (a), a condition necessary to the conversion of towage into salvage. Lord Kingsdown there laid down the law in these terms : “ The steam-tug does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task ; because the performance of the task is interrupted, or cannot be completed in the mode in which it was originally intended, as by the breaking of the ship's hawser. But if in the discharge of

(a) *Lushington*, 335, 347.

this task, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage." This disposes of the main claim, for the *Blazer* did the principal work. The danger of the ship, moreover, is much exaggerated.

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Brett, Q. C., in reply.—The judgment of the Privy Council does not exclude the inferior case from salvage, where the tug, performing extraordinary duties, does not incur risk : it only insists upon the salvage character of the superior case, where both risks are incurred and extraordinary duties performed. In the *Minnehaha*, the tugs did incur risk.

DR. LUSHINGTON, in the course of his summing-up to the *Judgment*. Trinity Masters, said :—If you are of opinion that the ship was in great danger, that she could only be delivered from that danger by steam power, and that she was so delivered by the services of the *Blazer*, I shall come to the conclusion that the services rendered were beyond the scope of the contract to tow. I am not disposed for petty services to consider the steam-tugs relieved from the obligation of the towage contract ; but I do not understand it to be law that a tug under a contract to tow can under no circumstances earn salvage reward, unless she herself incurs risk in the performance of the superior service of saving. I do not gather such to be the law from the judgment of the Privy Council ; nor is it in accordance with the rules of salvage prevailing in this Court. Risk to the salvor is not a necessary element of salvage, though it does, as we all know, enhance the merit of the service, and earn a higher reward.

Upon the Trinity Masters advising the Court that the ship was in a position of danger, and was extricated by the *Blazer* and *Scout*, whose services were necessary for that purpose, the learned Judge awarded the plaintiffs the sum of 500*l*.

Toller, proctor for the plaintiffs.

Rothery, proctor for the defendants.



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THE LONDON.

Collision—Inevitable Accident—Practice as to Costs.

In causes of collision, where the Court finds inevitable accident, the general rule is, that each party pays his own costs; but the Court still holds, and will on occasion exercise, a discretionary power to condemn the plaintiff in costs.

THIS was a cause brought by the owner of the late brig Hugh against the owner of the schooner London, to recover damages for the loss of his ship occasioned by a collision on the 19th of October, 1862. The collision took place in Aldborough Roads at night, during a storm which drove ashore and wrecked several vessels. The defence pleaded was inevitable accident; and on the hearing the Court so found. The question of costs was reserved for argument.

The Queen's Advocate and *Deane*, Q. C., for the plaintiff.—The practice in these cases of inevitable accident is that there is no order as to costs: it was so stated by the Court in the case of the *Itinerant* (a), and the rule was there acted upon. A similar decree passed in the *Ebenezer* (b), and also, apparently at least, in the *Bolina* (c). In the *England* (d), the plaintiffs were condemned in costs, but no reason was given, and the decree might have gone per incuriam. There is nothing in the circumstances of this case to deprive the plaintiff of the benefit of the general rule.

Brett, Q. C., and *Clarkson*, contra.—It must be admitted that it is a good general rule that costs should follow the event; the plaintiff takes his chance of winning; if he fails, should he not lose, or rather, why should not the defendant recover the costs he has been put to by the injudicious act of the plaintiff? Even if there be a peculiar rule in this Court that absolves the plaintiff from the ordinary penalty, if the collision prove to be occasioned by pure accident, it is admitted not to be an unbending rule. Besides the case of the *England*, there is the case of the *Thornley* (e). The Court there said, on the counsel for the defendant asking for costs: "Yes; in my judgment, this collision was purely and clearly accidental. I do not think there was sufficient ground for bringing the action." The circumstances of this case also show rash litigation on the part of the plaintiff.

(a) 2 W. Rob. 236.

(b) 2 W. Rob. 206.

(c) 3 N. of C. 208, 210.

(d) 5 N. of C. 170, 176.

(e) 7 Jurist, 660.

DR. LUSHINGTON.—In this case the Court has found that the collision was an inevitable accident, and pronounced against the damages, and the only question now is whether the plaintiff ought to be condemned in costs. I quite agree with Mr. Brett, that, on principle, costs ought to follow the event; but if there is any settled rule of practice, it is necessary to abide by that. I have caused inquiry to be made, and I find that in these cases of inevitable accident, the usual practice, the general rule I may call it, has been to make no order as to costs: as I had occasion to state in the *Itinerant* (a). But looking to all the cases, it is clear that the Court still holds, and will on occasion exercise, a discretionary power to condemn in costs. Thus in the *Thornley* (b), I ordered the plaintiff to pay costs, saying that he had no sufficient ground for bringing his action.

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I deem myself therefore free to consider the circumstances of the case, and I must say that, considering the collision took place in a most tempestuous night, a night in which, in this one place, eight vessels were wrecked, the plaintiff had good reason to think the collision was a mere accident, which could not have been avoided, and that he was unduly rash in bringing his action. I therefore condemn him in the costs. The costs of the motion will follow.

Deacon, proctor for the plaintiff.

Clarkson, proctor for the defendant.

(a) 2 W. Rob. 244.

(b) 7 Jurist, 660.

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THE WILD RANGER.

Collision—Bail—Judgment—Proceeds in Court—24 Vict. c. 10, s. 15—1 & 2 Vict. c. 110, s. 12—17 & 18 Vict. c. 125, s. 61.

In a cause of collision, the ship having been released from arrest upon bail given in the full sum in which the cause was instituted, cannot be re-arrested by the plaintiff to answer his damages, if, after the ordinary decree and reference, they prove to exceed that sum: and if the ship has been sold by the Court in another action brought by other parties, the Court cannot under its general authority, or under the 15th section of the Admiralty Court Act, 1861, order the proceeds of the ship to be applied to satisfy such damages or interest or costs in the first action.

Where a ship has been sold by order of the Court, and the proceeds are in the registry, such proceeds are not "money belonging to the owners of the ship" (1 & 2 Vict. c. 110, s. 12), nor a "debt owing" to them (17 & 18 Vict. c. 125, s. 61).

ON the 3rd of January, 1862, a collision took place on the high seas beyond British jurisdiction, between the Wild Ranger, an American vessel, and the Coleroon, a British vessel. On the 9th of January, 1862, the Wild Ranger was arrested on behalf of the owners of the Coleroon in the sum of 3,500*l.* The owner of the Wild Ranger entered an appearance, and on the 14th of January the ship was released on bail, in the ordinary form, the bail consenting, that "if he the said defendant shall not pay what may be adjudged against him in the said cause with costs, execution may issue forth against us, our heirs, executors and administrators, goods and chattels for a sum not exceeding 3,500*l.*" On the 18th of January in the same year, the ship was arrested on behalf of the owners of the cargo, which had been laden on board the Coleroon, for a claim of 9,000*l.*, and in this latter action she was sold under order of the Court, and the proceeds brought into the registry. On the 27th of February, 1862, judgment in both actions was delivered upon the merits, and the Wild Ranger found to blame for the collision. On the 2nd of December, 1862, the question was argued, whether, on behalf of the Wild Ranger, a claim could be sustained for limited liability under the 504th section of the Merchant Shipping Act. The Court pronounced against such a claim (*a*), and the amount of the damage in both actions was referred to the Registrar and Merchants for assessment. On the 24th of April, 1863, the Registrar delivered his report, and found that the damage sus-

(*a*) Lushington, 553.

tained by the owners of the Coleroon was 3,592*l.*, and that that sum was due to them, together with interest, as from the 15th of April, 1862, and costs. This sum of 3,592*l.* exceeded by 92*l.* the amount in which bail had been given. Consequently after the bail had been exhausted, there still, according to the Registrar's report, remained due to the owners of the Coleroon 92*l.*, and interest and costs. In the meantime the reference in the other cause had gone on, and the claim of the owners of the cargo on board of the Coleroon, which proved to be much less than was anticipated, was satisfied out of the proceeds from the sale of the Wild Ranger; and, after it had been satisfied, there remained in the registry surplus proceeds to the amount of 1,498*l.* 12*s.* 5*d.* It was with respect to the disposal of these surplus proceeds that the question now arose. The owners of the Coleroon made a motion in the first cause that the fund should be paid out to them in satisfaction of what remained due on their judgment, whilst the owners of the Wild Ranger made a counter motion in the second cause that the fund should be paid to themselves.

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The 15th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), is as follows:—

“ All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the same effect as judgments in the Superior Courts of Common Law, and the persons to whom any such monies, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors, and all powers of enforcing judgments possessed by the Superior Courts of Common Law, or any Judge thereof, with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any monies, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid.

The 61st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), enacts:—

“ It shall be lawful for a judge upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by himself or his attorney stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is

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indebted to the judgment debtor, and is within the jurisdiction, to order that *all debts owing or accruing from such third person* (hereinafter called the garnishee) *to the judgment debtor* shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Judge or a Master of the Court, as such Judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt."

Cleasby, Q. C., for the owners of the Wild Ranger.—The owners of the Wild Ranger are intitled to receive from the Court the residue of the proceeds of their own ship. The owners of the Coleroon have no right to this money at all. They are bound by the amount in which they instituted their cause; and the *Kalmazoo* (a) is an express authority that a ship cannot be arrested a second time to supplement the first action. The judgment of the plaintiffs must be considered as entirely satisfied by the payment by the bail to them of 3,500*l.*, the amount of their action.

But, assuming that they are judgment creditors for the residue of their loss, they cannot touch these proceeds. This is money in the hand of the Court: the Court holds the money in trust for my clients: execution cannot go against it; for it is not "money belonging to" the defendants within 1 & 2 Vict. c. 110, s. 12. Nor can it be attached under the garnishee clauses of the Common Law Procedure Act. In Archbold's Practice (b) is a catalogue of debts that cannot be attached; amongst them is money in the hands of the sheriff, the produce of an execution at the suit of the debtor; money ordered to be paid by a rule of Court, for which the case of *Coppell v. Smith* (c) is cited; and money in the hands of the government or its agents, unless where the latter have made themselves personally responsible. This money is not a "debt owing" to the defendants.

Lushington for the owners of the Coleroon.—The fund in Court is in the equitable discretion of the Court. The owners of the Coleroon have a judgment against the defendant for the residue of their damages, interest, and costs; and they have at least an equitable lien upon the fund, which represents the ship, the offending ship. They ought not to be barred by the amount in which their action was instituted: that amount, it is decided

(a) 15 Jur. 885.

(c) 4 T. R. 312.

(b) 11th Ed., p. 701.

(*Florence Nightingale* (a)), may be increased at any time before the hearing, and there is no reason why it should not be allowed to be increased after the hearing: were it otherwise, plaintiffs would be tempted to arrest ships in immoderate sums. The defendants ought at any rate to be liable for costs over and above the amount of the action, costs caused by their unjustifiable litigation: *John Dunn* (b). There is no reason either why the present plaintiffs should be prejudiced by the fact that they took bail in lieu of the ship in their action; for the bailing was purely for the benefit of the defendants. The case should be considered, as if the ship itself was still under arrest in the plaintiffs' action. It is submitted therefore that apart from the statute the plaintiffs are intitled to have their judgment satisfied out of these proceeds, upon the ground that the Court has an equitable control over the funds in its own possession. No second warrant is taken out here, as in the *Kalmazoo*; and the principle that an action in rem cannot be supplemented by proceedings in personam is now overruled by the Admiralty Court Act, sect. 15.

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But, secondly, the Court now has by that section the like powers to enforce its judgments as a Court of Common Law. If therefore those proceeds are the property of the defendants, the Court may issue execution upon them; this money is, subject to any overruling claim allowed by the Court, "money belonging to" the defendants. But, if this money is to be considered as a debt owing to the defendants, the Court, it is submitted, may attach the debt under the garnishee clauses of the Common Law Procedure Act, 1854.

Cleasby, Q. C., replied.

DR. LUSHINGTON [after stating the facts as above]:—

Out of this fund now in Court, the balance of the proceeds of Judgment. the *Wild Ranger*, the owners of the *Coleroon* demand payment for three separate sums, for the balance of damage, for interest, and for costs. The damage and interest are in the same category, the costs in some respects subject to a different consideration.

Now bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action. Also if the ship is sold in another action, the proceeds, save by the operation of some Act of Parliament, are

Bail once given, the ship is wholly released from that cause of action;

(a) *Ante*, p. 29.

(b) 1 W. Rob. 159.

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and the proceeds of the ship likewise.

liable only to the payment of liens. In this case, then, after bail was taken the ship herself never could have been made liable to the plaintiffs for damage or interest; and I am of opinion that the proceeds of the ship sold in another action are, in legal consideration, as the ship itself, and therefore cannot be made available to answer this demand.

Costs stand in some respects differently. It is settled law that costs may be given over and above the value of the ship proceeded against. A decree for costs may be a decree against the defendant personally, and I will consider such to be the case here. But a decree in personam for costs is no lien on the fund now in Court; and, unless by the operation of some statute, I am of opinion that I could not order the costs to be paid out of these proceeds any more than I could order any other debt due from the defendant to be so paid. Then the only remaining question is whether by virtue of the recent statute, which has conferred so large an additional power on the Court, I can direct such payment. It was contended on the part of the owner of the ship that the powers conferred on this Court were only the same as those possessed by Courts of Common Law, and that according to their decisions this particular fund could not be resorted to by the Court to satisfy any judgment debt against the defendant. The fund in question is a part of the proceeds of a ship sold by the Court to answer a legal demand; it is in the hand of the Court, which holds it in trust; the owner is in one sense intitled to it, but he cannot obtain it save by order of the Court. It is not money belonging to the owners of the ship, so as to be capable of being seized under the 1 & 2 Vict. c. 110, s. 12(a). Then is it a debt owing to the defendants so as to be liable to be attached under the garnishee clauses of the Common Law Procedure Act? It resembles money ordered to be paid by a rule of Court, and it appears from Archbold's Practice, Prentice's Edition, pp. 701, 702, cited by Mr. Cleasby, that such monies cannot be attached. I think it unnecessary to say more, because the Court being now invested, by the statute of 1861, with an authority such as the Courts of Common Law possess, must in exercising that authority be guided by their decisions. The money must be paid out to the owners of the Wild Ranger.

The proceeds in Court are not "money belonging to" the defendants, nor a "debt owing to them."

Rothery, proctor for the owners of the Coleroon.

Thomas and *Capes*, proctors for the owners of the Wild Ranger.

(a) Chitty's Archbold, 11th ed., p. 634.

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In the Privy Council.

Present—LORD KINGSDOWN.

LORD CHELMSFORD.

LORD WENSLEYDALE.

THE EUROPA.

Collision—Maritime Lien—Reasonable Diligence.

A maritime lien follows the ship into whosoever hands she may pass, and may be enforced after a considerable lapse of time; but, to affect the rights of third persons, reasonable diligence in its enforcement must be used, otherwise the lien may be lost.

Reasonable diligence means not the doing of everything possible, but of that which, having regard to all the circumstances, including considerations of expense and difficulty, can be reasonably required.

COLLISION. This was an action brought by the owners of the schooner *Integrity* against the brig *Europa* to recover damages occasioned by a collision between the two vessels off Cape St. Vincent, on the 13th of December, 1859, whereby the *Integrity* was sunk. The cause was instituted on the 13th of February, 1860, but the vessel was not arrested until the 14th of January, 1863. The owners of the *Europa*, Philip Henry Dean, George Beaumont Dean, Maria Griffiths, and William Lang Page Cox filed their answer, in which the following facts were averred:—

In November, 1861, the *Europa*, then in the port of Liverpool, was advertised for sale in the *Liverpool Telegraph* on several consecutive days, and was purchased by Philip Henry Dean, one of the defendants, for the sum of 785*l.* from Alexander M'Dougall, shipowner, of Maitland in Nova Scotia, who at the time of such purchase was in Liverpool. The vessel was transferred to Philip Henry Dean by a bill of sale, dated the 28th of November, 1861, and on the same day was also registered in his name. On the 23rd of December following, the defendant Philip Henry Dean sold certain shares in the ship to the defendant George Beaumont Dean, to the defendant Maria Griffiths, and to the defendant Cox, retaining thirty-two sixty-fourth shares for himself. The defendants were respectively owners of such shares in the vessel at the time of her arrest in this suit. On the following day, the 24th of December, 1861, the *Europa*, having since her purchase by the defend-

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In their replication the plaintiffs alleged that, on the 27th of December, 1859, Messrs. Pritchard and Sons, their proctors, were instructed to take proceedings against the Europa to recover the damages occasioned by the collision, and a correspondence between those gentlemen and a number of persons was set out showing the efforts that had been made to arrest the vessel. The material facts bearing upon the amount of diligence used by the plaintiffs and their agents sufficiently appear from the arguments of counsel and from the judgment. The rejoinder, after traversing many of the articles of the replication, and especially the 15th article, which alleged that, during the years 1861 and 1862, search had from time to time been made on behalf of the plaintiffs in the *Shipping and Mercantile Gazette*, went on to allege that the arrival of the Europa at Liverpool on the 8th of November, 1861, and her departure from that port for Lagos on the 23rd of the following month, were duly notified in the *Shipping and Mercantile Gazette*, in the *Times*, and in other London papers; and that her arrival at Liverpool on the 22nd of June, 1862, and her departure on the 22nd of July following for

Vera Cruz, were duly notified in the *Shipping and Mercantile Gazette* and in other London papers.

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At the hearing of the cause, on the 16th of April, 1863, two witnesses on behalf of the plaintiffs were examined before Dr. Lushington and Trinity Masters upon the circumstances of the collision, whereupon, the defendants calling no witnesses and offering no observations upon that part of the case, the Court pronounced the Europa solely to blame. Both parties then proceeded to call and examine witnesses on the question of laches and counsel were heard thereupon.

Milward and *Pritchard* for the plaintiffs.

Brett, Q. C., and *Potter*, for the defendants.

On the 13th of May DR. LUSHINGTON gave judgment.—The collision, which is the subject-matter of this cause, took place on the 13th of December, 1859, off Cape St. Vincent. The action was originally entered in February, 1860, but the arrest was not executed till January, 1863. With regard to the collision itself there is no defence. On ex parte evidence the Court necessarily came to the conclusion that the Europa was to blame. The question to be now decided is whether or no the plaintiffs, by any negligence or laches on their part, have lost their lien upon the ship in the hands of her present owners. It is settled law that a just claim for damage constitutes a lien against the ship doing the damage, and that the lien may be enforced where there has been no improper delay or laches. The law is thus laid down by the Judicial Committee of the Privy Council in the case of the *Bold Buccleugh* (a). “This rule, which is simple and intelligible, is in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay, where the rights of third parties may be compromised; but, where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosoever possession the thing may come.” That this claim has been pursued by the plaintiffs in good faith I see no reason to doubt. The sole question therefore is, have they exercised reasonable diligence?

Now it appears that as soon as Mr. Richards, the principal owner of the Integrity, heard of the accident, he communicated with the underwriters—those most interested in discovering the aggressor and in obtaining payment for the loss. By them the

(a) 7 Moore, P. C. C. 285.

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matter was placed in the hands of Messrs. Pritchard, the proc-tors. These gentlemen were resident in London, and had consequently ample means of making the necessary inquiries; and Mr. Barrow, the secretary to the insurance company, had a right to rely upon their experience in such matters. I must say that those gentlemen fully justified the confidence reposed in them. Inquiries were made at Glasgow because the ship had sailed from a Scotch port; there was a correspondence with respect to proceeding against the Europa at Gibraltar, as she was expected to pass through the Straits; warrants were taken out to be served at Plymouth and Falmouth when there was reason to believe the ship would touch there; and measures were adopted to detain her if she should come to Ireland. With respect to inquiries in London, I have no hesitation in expressing my opinion that Messrs. Pritchard did much more than could reasonably be required of them. I refer especially to their personal attendance at Lloyd's, and to the services of Mr. Charles Pritchard. To ensure the attainment of the object in view at a reasonable expense, Messrs. Pritchard employed Mr. Paddle, a clerk at the Jerusalem Coffee House, whose duty it is to inspect the lists of shipping in the *Shipping Gazette* and other shipping lists. In fact, great efforts were made to discover the vessel.

In answer to this case the defendants say that there are many circumstances which show that reasonable diligence was not used. In the first place, it is said that nothing was done at Nova Scotia, the country to which the vessel belonged. The allegation is true, but I think the inference attempted to be drawn from it erroneous. Certainly it was not incumbent on the plaintiffs to send the witnesses over to Nova Scotia and to sue the owners personally. There is no evidence that the ship herself was there; and the question, as stated by the Judicial Committee, is, whether there was reasonable diligence in enforcing the lien—not whether a personal action might not be brought, as it certainly could have been, and indeed as it was in Scotland in the case of the *Bold Buccleugh*. But, even if the Europa had been in Nova Scotia, and if the plaintiffs knew she was there, I could attribute very little weight to the objection. But then the defendants say that this vessel has, during the time which has elapsed since the collision, been twice in Liverpool; and it is contended that by due diligence these facts might have been ascertained, and the vessel arrested. It certainly is possible that by the employment of an agent at Liverpool the vessel might have been discovered; it is possible that by a more accurate examination of Lloyd's Lists the same discovery might have been made, notwithstanding that the name Europa is a common name (not

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less than six vessels bearing that same appellation), and notwithstanding too the change of master. All this is true, but the real question is, whether, in order to preserve the lien on the ship, it was incumbent on the plaintiffs to have an agent in several of the principal ports in this country, and to incur the expenses consequent thereon. It must be admitted that something more might have been done, but in almost every possible case this must be so. What I have to decide is, whether what has been done constitutes reasonable diligence; and the meaning of that expression is not the doing of everything possible, but the doing of that which, having regard to all the circumstances, including considerations of expense and difficulty, could be reasonably required.

I am of opinion that the acts done by the plaintiffs and their agents do constitute reasonable diligence. I regret that the loss should fall upon innocent parties. The maxim is *caveat emptor* as to all legal liens. I must pronounce in favour of the maritime lien of the plaintiffs, and with costs, which always follow the judgment in cases of damage.

From this judgment the defendants appealed. The appeal was argued on the 17th July.

Sir Hugh Cairns, Q. C., and *Brett*, Q. C. (*Potter* with them), for the appellants.—The proposition for which the plaintiffs contend in this case is a large one. If they are right it follows that in the event of a collision between a British and a foreign ship the latter might stay away for twenty years and then be arrested here, no matter through how many hands she had passed in the interim. No doubt the case of the *Bold Buccleugh* (a) is not to be questioned, but the defendants, the present appellants, contend that the doctrine of indelibility of a maritime lien ought not to be carried any further against an innocent purchaser. In order to bring themselves within the decision the respondents must show that there was no want of due diligence in the enforcement of their claim. But their own pleadings and evidence show that they were guilty of laches. In the first place, although they were aware that the *Europa* belonged to Maitland, in Nova Scotia, they take no steps for enforcing their lien there, nor do they even write to that place to make inquiries. Then again, having ascertained that the *Europa* was trading with Mexico, they must have known Liverpool to be the port at which she would call in

(a) 7 Moore, P. C. C. 267.

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the event of her coming to this country, and yet no steps were taken by them to ensure their being advised of her arrival should she put in there. The admitted facts of the case prove this. The vessel was twice allowed to leave Liverpool, after being in that port a considerable length of time. On the first occasion she arrived there on the 8th of November, 1861. On the 19th, 20th, 21st, and 22nd days of that month she was advertized for sale in the *Liverpool Telegraph*. She was sold, and then underwent extensive repairs there, and it was not until the 24th of December that she sailed for Lagos. More than this, both her arrival and departure were announced in the *Shipping Gazette*, in the *Times*, and in other London papers, and yet the plaintiffs knew nothing about her. Again, she came to Liverpool on the 22nd of June, 1862, and remained there for a month; her arrival and departure were again announced in the *Shipping and Mercantile Gazette* and other papers, and yet the plaintiffs knew nothing about her. The case of the *Bold Buccleugh* (a) is a very different one. There all diligence was used by the plaintiffs; otherwise, it is manifest from the terms of the judgment of the Privy Council, they would have lost their lien. The judgment of the Privy Council in the case of the *Australia* (b) also shows that the greatest possible promptitude in the enforcement of the right must be used.

Milward and Pritchard (Rolt, Q. C., with them) for the respondents.—The facts of this case disclose no laches on the part of the plaintiffs. The collision occurred on the 13th of December, 1859, off Cape St. Vincent, the vessel proceeded against being then bound for Marseilles. Before the end of that month Messrs. Pritchard and Sons were instructed to proceed for the recovery of the damages. Efforts were at once made to prosecute the claim in Gibraltar. Inquiries were made in Glasgow and other ports in Scotland, the *Europa* having at the time of collision been bound on a voyage from Ardrossan. On the 12th of February, 1860, Mr. Pritchard was informed that on the 3rd of that month the *Europa* had sailed from Marseilles bound for Falmouth for orders, and that it was probable that her master had the option of calling at Plymouth or Queenstown. Thereupon two warrants were taken out of the Court of Admiralty in England—one for Falmouth and one for Plymouth—and one out of the Irish Admiralty Court for Queenstown, but without effect. Searches were made in Lloyd's Lists and other papers, but it appears there are no less than eight *Europas*, besides several

(a) 7 Moore, P. C. C. 267.

(b) Swabey, 480, 486.

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Europes ; and moreover the master of the vessel proceeded against, by whose name the ship might have been identified, had been changed. All this appears uncontradicted from the pleadings and the evidence. Applying the law to this state of things the case of the *Bold Buccleugh* (a) is an authority which supports our contention that the maritime lien arising out of the collision follows, and may be enforced against, the ship into whosesoever possession she may come. It is true that in delivering the judgment of the Privy Council in that case Sir John Jervis says (b), "It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised ;" but his Lordship goes on to say, "where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosoever possession the thing may come." That the proceedings on the part of the plaintiffs in this case are in good faith is expressly found by the judgment of the Court below, indeed this has never been contested. We submit it is equally clear that at least "reasonable diligence" has been used. In the case of the *Nestor* (c), Mr. Justice Story in dealing with the claim of material-men—a claim which has always been recognized in the United States as the subject of maritime lien—says, "It is not necessary to say that the lien is indelible, or that it may not be lost by gross neglect and delay to enforce it, at least where the rights of other persons have intervened." The case of the *Repulse* (d) is perhaps the case which has carried to the fullest extent the doctrine for which the plaintiffs contend. There Dr. Lushington held that a master cognizant of an approaching sale of his vessel by a mortgagee, and not dissenting from it, did not thereby lose his statutory claim for wages on the ship in the hands of the purchaser. With regard to the hardship which it is said is inflicted on the defendants by the judgment in this case, we may quote the words of Dr. Lushington in another case, that of the *Nymph* (e). "There can be no doubt whatever that if a purchaser takes a vessel as free from liabilities, and liabilities attach to her, he has a remedy against the vendor ; and it cannot be considered a case of hardship when he knows what the law demands and what he needs for his protection." As the same learned judge says elsewhere in his judgment in the same case, "it becomes the duty of those who purchase ships to take care with whom they deal." Those observations, which were made in a suit for master's wages, apply with even greater force in the present case, because although the bill

(a) 7 Moore, P. C. C. 267.

(b) 7 Moore, P. C. C. 285.

(c) 1 Sumner, 73, 85.

(d) 4 N. of C. 166.

(e) Swabey, 86, 87.

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of sale has not been put in, we know that the form of such documents is given in the schedule to the Merchant Shipping Act, 1854, and that it contains a covenant by the vendor that his vessel is free from incumbrances. The necessity for the exercise of caution by purchasers of vessels was also pointed out in the cases of the *Druid* (a) and the *Royal Arch* (b), nor is this principle for which the plaintiffs contend one peculiar to the Court of Admiralty. For present purposes the position of the purchasers of this vessel is analogous to that of a purchaser of real property who has paid his money upon the faith of there being no charge thereon, but who subsequently discovers that a mortgage existed. The Courts of Equity have held that even where a purchaser has been placed in such a position by the fact of the title deeds having been left in the hands of the mortgagor by the mortgagee, the mortgagee shall nevertheless have priority. Such was the decision in *Finch v. Shaw* and *Colyer v. Finch* (c). The Master of the Rolls (Sir John Romilly) there says, "It is said, that Mr. Finch ought to have known of the sale, and that he ought to have given notice of his mortgage. It is proved, I think conclusively, that he did not know of the sale. It would be monstrous to say that the mortgagee is to lose his priority because he did not know of a sale by auction of the property, and did not give notice of his charge upon it." That decision was affirmed on appeal to the House of Lords, where the Lord Chancellor said, "The rule on this subject is now well settled. A first mortgagee, having the legal title, is not to be postponed to a subsequent purchaser or mortgagee, merely because he has not possessed himself of the title deeds. In order to deprive the first mortgagee of his legal priority, the party claiming by subsequent title must satisfy the Court that the first mortgagee has been guilty either of fraud or gross negligence, but for which he would have had the deeds in his possession:" *Colyer v. Finch* (d). The more recent case of *Hunt v. Elmes* (e), affirmed on appeal to the Lords Justices (f), is an authority to the same effect. Caveat emptor is, we submit, a maxim which applies in its fullest extent to this case.

Sir Hugh Cairns replied.—The case of the *Repulse* (g) cited on behalf of the respondents does not apply. There the plaintiffs' claim was not the subject of maritime lien, but one for which a particular statutory remedy was given. Then as to the cases referred to in the Courts of Equity, there is this broad

(a) 1 W. Rob. 391.

(b) Swabey, 269.

(c) 19 Beav. 500, 515.

(d) 5 H. of L. Cases, 905, 928.

(e) 28 Beav. 631.

(f) 2 De G., F. & J. 578.

(g) 4 N. of C. 166.

distinction between those cases and the present. There the party said to occupy a position analogous to that of the present plaintiffs had had the legal estate passed to him by the mortgage deed,—he was the legal owner of the property. Here, all the plaintiffs contend for is a maritime lien, which is no estate at all, but—to use the definition adopted by the Privy Council in the case of the *Bold Buccleugh* (a)—“a privilege or claim upon the thing to be carried into effect by legal process.”

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LORD WENSLEYDALE delivered the judgment of their Lordships:—

Their Lordships have had an opportunity of considering this case, and are of opinion that the judgment of the learned judge of the Admiralty Court ought to be affirmed. The law upon the nature and force of maritime lien is very distinctly laid down in the case of the *Bold Buccleugh* (b), which has been so much referred to in the argument here, as well as in other cases. Sir John Jervis, in giving the judgment of their Lordships, after stating that a maritime lien does not include or require possession, goes on to define the nature of such lien. “A maritime lien” (he says) “is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists, a proceeding *in rem* may be had, it will be found equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This rule” (he continues), “which is simple and intelligible, is in our opinion applicable to all cases. It is not necessary to say that the lien is indelible and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosoever possession the thing may come.” But it is said that in order to bring the present case within the rule thus laid down, there must have been no laches, but due diligence must have been used to follow the lien, and that there has not been such reasonable diligence exercised here as will make the rule applicable; and it is urged by the appellants’

(a) 7 Moore, P. C. C. 267, 284.

(b) 7 Moore, P. C. C. 284, 285.

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counsel that if the principle laid down in the *Bold Buccleugh* is to be carried further, there can be no limit to such claims, and that no lapse of time will be sufficient to protect a bonâ fide purchaser of a vessel from such a claim. It is not necessary to carry our decision to such an extent. The question for their Lordships is, whether they are satisfied that the law as laid down in their previous decision has been properly applied to the facts of the case before them, and they have no hesitation in saying that they entirely concur in the view of the facts taken by the learned Judge in the Court below and the application of the law to those facts. It is not necessary, therefore, for us to go into any detail regarding them. We think with the learned judge that the agents for the respondent, Messrs. Pritchard, made every inquiry and examination that was within their ordinary ability to ascertain the port where the *Europa* was to be found, by resorting to the underwriters and the *Shipping Gazette*, and to procure her arrest by the instructions sent in their letters to Gibraltar, Plymouth and Queenstown. We are all of opinion they were not bound to have made inquiries at Liverpool, although as it turned out such inquiries might have led to the arrest of the ship in that port, but in the circumstances we do not think that such inquiries were requisite, or that the omission to make such could be held to bar the right to follow the lien.

After the full discussion at the bar which we have had the advantage of hearing, we are clearly of opinion that the judgment of the learned judge was right, and must recommend Her Majesty to dismiss this appeal with costs.

Tebbs & Son, proctors for the appellants.

Pritchard & Son, proctors for the respondents.



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In the High Court of Admiralty.

THE ROBERT POW.

*"Damage" occasioned by Negligence in Towing—3 & 4 Vict. c. 65,
s. 6; 24 Vict. c. 10, s. 7.*

The Court of Admiralty has not jurisdiction under 3 & 4 Vict. c. 65, s. 6, or 24 Vict. c. 10, s. 7, or otherwise, to entertain a claim against a steam-tug for damage occasioned to the vessel towed by negligence in towing, if the damage arises not by collision but by the vessel taking the ground.

THIS was a cause instituted as a cause of damage by the owners of the Finnish barque Ilma against the steam-tug Robert Pow.

The petition of the plaintiffs stated that whilst the barque was being towed up the River Tyne by the Robert Pow steam-tug, the master of the steam-tug, in disobedience to the orders of the pilot, so towed the barque that she took the ground and sustained damage. The petition then prayed the Court to pronounce for the damage so occasioned by the negligence of the defendants' servants.

A notice of motion by way of demurrer in objection to this petition was filed on behalf of the defendants.

The 6th section of the 3 & 4 Vict. c. 65, enacts:—

"The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage rendered to or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessities supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered, or damage received, or necessities furnished, in respect of which such claim is made."

The 7th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), which is entitled "An Act to extend the Jurisdiction and amend the Practice of the High Court of Admiralty," enacts:—

"The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship."

Clarkson in support of the demurrer.—The Court has not jurisdiction. This is no case of collision, no case of "damage"

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proper, but a suit for breach of contract; the remedy for which is in another Court. The Court has never exercised jurisdiction over a claim of this kind, nor has it jurisdiction either under 3 & 4 Vict. c. 65, s. 6, or 24 Vict. c. 10, s. 7. In each of those statutes, the latter of which was clearly intended only to be supplemental to the former, the word "damage" must be understood in the sense in which it is technically applied in the Admiralty Court, damage by collision. The purpose of the 3 & 4 Vict. was to extend the jurisdiction over a new local area, waters within the body of a county, not to extend it to new subject-matter. If the purpose of the Admiralty Court generally was to confer new jurisdiction, the words used do not apply. This is not "damage done by any ship." Neither is this a "claim for towage."

Lushington, contra.—This claim is a most fit matter to come before the Court of Admiralty, which is familiar with navigation and has express jurisdiction over "claims in the nature or towage." The purpose of the recent statutes has been to extend the jurisdiction of the Court, and the tendency of the decisions has been to give them full and liberal effect: *Nightwatch* (a); *Malvina* (b). It is submitted that this is a case of "damage received by a ship", which is all that the earlier statute (3 & 4 Vict. c. 65) requires, and also a case of "damage done by a ship," which is the expression of the later statute (24 Vict. c. 10). Damage done by a ship means in law "damage done by the negligence of those on board;" and there is no need of giving a limited and technical meaning to the phrase "damage," so as to confine it to the damage done by collision.

In the *Julia* (c), Lord Kingsdown lays down the law applicable in the Admiralty Court to the case of one vessel towing another in these terms. "When the contract was made, the law would imply an engagement that each vessel would perform its duty in completing it; that proper skill and diligence would be used on board of each; and that neither vessel, by neglect or misconduct, would create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of this contract, any inevitable accident happened to the one without any fault on the part of the other, no cause of action could arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of

(a) *Lushington*, 542.(c) *Lushington*, 231.(b) *Lushington*, 493; affirmed, *ante*, 57.

either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskillfulness on her part contributed to the accident. These are the plain rules of law by which their Lordships think that the case is to be governed."

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DR. LUSHINGTON.—The defendants in this case have moved *Judgment*, the Court to reject the petition filed by the plaintiffs, on the ground that the Court has not jurisdiction to entertain the suit.

The cause is entered as a cause of damage, on behalf of the owners of the *Ilma* against the steam-tug *Robert Pow*, and the petition alleges the following facts. That on the 13th of May, 1863, the *Ilma* was off Seaham bound for the River Tyne, and that she engaged the *Robert Pow* to tow her into Shields; that the *Ilma* had a licensed pilot on board, and that in disobedience to his orders the master of the tug so towed the *Ilma* that she took the ground and received damage. The petition then prays the Court to pronounce for such damage.

It is obvious upon this statement, and it is alleged in terms, that this damage was occasioned by the negligence of those on board the tug, and it was no doubt a breach of the contract that the towage service should be properly and carefully performed. But on the other hand, there was no collision of any kind between the two vessels; and the question is whether, under the 6th section of the 3 & 4 Vict. c. 65, or under the 7th section of the Admiralty Court Act, the Court has jurisdiction to try the cause. It is admitted that save by virtue of these statutes the Court has no such jurisdiction.

The 6th section of the 3 & 4 Vict. enacts, that the Court shall have jurisdiction to decide all claims and demands whatsoever in the nature of damage received by any ship, or in the nature of towage. Reliance is placed upon both these heads of jurisdiction conferred. I am of opinion, however, that under neither of them has the Court jurisdiction over the present case, not because the case embraces a question of contract, but because as to the claims in the nature of towage the terms used manifestly point to suits brought for towage rendered, more particularly the words "and to enforce payment thereof;" and because in the term "claims in the nature of damage," the word "damage" must be taken according to the well understood meaning of the phrase in the Admiralty Court, namely, damage done by collision. The purpose of the section, it is well known, was to extend the ordinary jurisdiction of this Court to waters within the body of a county.

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For a similar reason, I think the Court cannot proceed in this case under the 7th section of the Admiralty Court Act, which gives jurisdiction over any claim for damage done by any ship. As in the former statute, damage here means damage done by collision. The petition therefore must be rejected with costs.

Rothery, proctor for the plaintiffs.

Clarkson, proctor for the defendants.

THE DANZIG.

Jurisdiction—Short Delivery—“Goods carried into any Port in England or Wales”—24 Vict. c. 10, s. 6.

The Court of Admiralty has jurisdiction under the sixth section of the Admiralty Court Act, 1861, over a claim for short delivery of cargo as per bill of lading in a British port, though the goods not delivered were not in fact carried into port.

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THIS was an action brought under the 6th section of the Admiralty Court Act, 1861, by the consignees of a cargo of numbered sleepers against the Danzig for short delivery of the cargo. The cargo was all comprised in one bill of lading, making the goods deliverable at the port of Hull; and the ship was there in fact discharged.

The answer of the defendants denied the short delivery in fact; and also pleaded:

“The sleeper-chocks and sleepers stated in the 3rd article of the petition as not delivered to the plaintiffs were, if not so delivered, not carried into any port in England or Wales, and the defendant’s proctor submits that in respect of such non-delivery this Honourable Court has no jurisdiction under the 6th section of the Admiralty Court Act, 1861, or otherwise.”

Notice of motion on the part of the plaintiffs was given to reject this article.

The section of the statute is as follows:—

“The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach

of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

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Lopes, in support of the motion.—If this defence were allowed, it is evident that the purpose of the statute would be almost entirely frustrated. The applicability of the statute cannot depend upon the nature of the cargo; if it applies to a cargo of rum, *Don Francisco* (a), it must apply to a cargo of wood; and whether the cargo consists of one or many articles, and whether the damage consists in the partial injury or total destruction of the thing carried, the statute must equally apply. Looking to these considerations the word "carried" in the statute must mean "to be carried," engaged to be carried under bill of lading. By the 3rd section of the Bills of Lading Act (18 & 19 Vict. c. 111), the bill of lading representing goods to have been shipped is conclusive of the shipment against the master, save in the case of fraud by the shipper or holder of the bill of lading, so that even the defence of nonshipment would not avail; but this defence is consistent with the fact that the goods were shipped and were lost on the voyage by the negligence of the master. The statute must surely apply.

Lushington, contra.—The jurisdiction of the Court rests wholly upon the statute. In the *Kasan* (b) it was decided that the words "any breach of duty or contract" must be limited by the preceding words, so as to apply only to the case of goods carried into England or Wales; and in the *Ironsides* (c), the circumstances of which were peculiar, it was in fact decided that the word "carried" means "actually carried," as distinguished from "engaged to be carried," for otherwise the judgment must have been in favour of the plaintiff. Here the goods, in respect of which the action is brought, were not carried into England, and the case therefore is without the statute. The plaintiff cannot treat the loss as a partial loss upon the entire consignment, the bulk of which was actually delivered in England, for the claim is for a total loss of particular goods.

DR. LUSHINGTON.—This is a cause brought under the provisions of the 7th section of the Admiralty Court Act. The damage complained of is that a cargo of wood goods, specified

(a) *Lushington*, 468.(c) *Lushington*, 458.(b) *Ante*, p. 1.

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in a bill of lading, was short delivered in Hull. The 4th article of the answer raises the defence that the articles not delivered were not carried into any British port, that is, not actually carried, and therefore that the case is not within the statute.

If this position could be maintained the consequence would be that if separate articles constituting half a cargo, or, indeed, if an entire cargo was totally lost by the negligence of the master, the owner or consignee would have no remedy under the provisions of this statute. There would be no remedy whenever there was a total loss of a single barrel or bale or other separate article. Such a construction would in the majority of cases render the statute wholly ineffectual. But I think that the intent of the statute is to give a remedy to the owner or consignee whenever the ship arrives in a British port, and the cargo is not duly delivered in consequence of a breach of contract or duty on the part of the owner, master or crew of the ship. This intention is sufficiently expressed; the term "carried" means "carried or to be carried." This case is distinguishable from the *Ironsides* (a), where there was a trans-shipment. The fourth article of the answer must be struck out, and the plaintiffs must have their costs.

Brooks and Dubois, proctors for the plaintiffs.

Coote, proctor for the defendants.

THE CHIEFTAIN.

Master's Wages and Disbursements—Wages "earned on Board"
—24 Vict. c. 10, s. 10—*Right of Mortgagee.*

A master is intitled to sue the ship for wages as "earned on board the ship" within the tenth section of the Admiralty Court Act, 1861, if he performed the duties of master, although during his service he did not sleep on board the ship, and many of his duties were performed on shore.

He may also sue for disbursements made by him during such service on the ship's account, but not for mere liabilities incurred.

The mortgagee of a ship may come in and defend his interest in the ship sued, but can rely only on defences open to the owner of the ship.

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THIS was a cause of master's wages and disbursements. The petition of the plaintiff was originally as follows:—

1. The plaintiff, John Coward, having been duly appointed by

(a) Lushington, 458.

Donald McLarty, the owner of the barque Chieftain, master of the said barque, at the wages of 10*l.* a month, and 30*s.* per week as board wages, has served as such master from the 26th of May, 1862, to the 14th of February, 1863.

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2. The plaintiff, as master of the said barque, disbursed various sums, necessary expenses for and on behalf of the said barque, *and has also become liable to a large sum in respect of necessaries ordered by him and supplied to the said barque,* and in respect of wages due and owing to the crew of the said barque.

3. Donald McLarty, the owner of the Chieftain, is insolvent, and the barque is in possession of the Thames Graving Dock Company, Limited, the mortgagees thereof; application has been made to the said owner and the said mortgagees by the plaintiff, for payment of his wages and disbursements, and they have refused to pay the same.

4. The plaintiff claims as follows:—

	£	s.	d.
Wages from 26th of May, 1862, to 14th of February, 1863, at 10 <i>l.</i> per month . . .	95	0	0
Board wages, during same time at 30 <i>s.</i> per week	57	0	0
Travelling expenses, 15 <i>s.</i> per week . . .	28	0	0
Sundry disbursements	15	0	0
Paid for labour before crew were shipped .	69	14	5
	<hr/>		
	264	14	5
<i>Wages due to crew</i>	48	3	0
<i>Necessaries supplied to barque on plaintiff's order . . .</i>	1303	0	0
	<hr/>		
	1351	3	0
	<hr/>		
<i>Total</i>	£1615	17	5
	<hr/> <hr/>		

Notice of motion was then given on behalf of the defendants, the Thames Graving Dock Company, that so much of the petition should be struck out as related to the claim for wages due to the crew, and to necessaries supplied to the barque on the plaintiff's order.

The 191st section of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), provides that—

“Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman, not being a master, has for the recovery of his wages.”

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And the 10th and 35th sections of the Admiralty Court Act 1861 (24 Vict. c. 10), enact—

s. 10. "The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship."

s. 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

Clarkson, in support of the motion.—The liabilities which the master has incurred are not "disbursements" within the 10th section of the Admiralty Court Act, and the Court has no jurisdiction.

Lushington, contra.—These liabilities are within an equitable interpretation of the word "disbursements." The master may be sued in respect of them and thrown into prison. In the *Glentanner* (a), the Court held that the master suing for his wages was, upon the mortgagees setting up a counter-claim, intitled to include in his accounts against the ship an item of 400*l.* in respect of a draft upon the owner, which the owner had dishonoured. So in *Randall v. Raper* (b), the Court of Queen's Bench decided that a plaintiff suing for a breach of warranty on goods sold might recover damages, which he had become liable to pay but had not paid to a third party to whom he had resold the goods with a rewarranty. The master may lose his lien, if he does not proceed to enforce it with all reasonable dispatch.

Judgment.

DR. LUSHINGTON.—The question for the Court is whether liabilities incurred by the master on behalf of the ship can be included in the term of "disbursements." If they can, the Court has jurisdiction by the 10th section of the Admiralty Court Act, but if they cannot, the Court has not jurisdiction; for before that statute the master could not sue here even for actual disbursements, and before the statute of 1854 not even for wages, unless in exceptional circumstances. The Court would be glad to assist the master, who is undoubtedly placed in a very hard position, but it is my duty to consider the terms of the statute.

The case of the *Glentanner* (c), which has been referred to, was decided upon the statute of 1854, which gave the Court

(a) Swabey, 415, 423.

(b) F. Bl. & E. 84.

(c) Swabey, 415.

authority upon any right of set-off or counter-claim being set up to a claim for master's wages, "to enter into and adjudicate upon all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due." These words are almost without limit, and are very different from the specific term "disbursements." Moreover there, though this does not seem to me very material, the master had been actually sued, and judgment had gone against him. The other case of *Randall v. Raper* (*d*) is inapplicable, because it does not turn upon terms at all, but upon a question of personal liability.

The terms of the statute, "disbursements made," appear clear to me; and I am of opinion that liabilities incurred but not paid are not within these terms. I must therefore grant the motion.

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Liabilities incurred, but not paid, are not disbursements within the statute.

Upon the application of Mr. *Clarkson* the learned Judge then ordered the ship to be released from arrest on bail being given to the amount of 464*l*.

The petition having been amended accordingly, the defendants then pleaded an answer, which stated that they were mortgagees; that during the whole period, in respect of which the plaintiff claimed wages as master, his services consisted solely in superintending the ship's repairs, loading, &c., whilst in dock, and that the plaintiff lived and slept on shore; and it then submitted that the plaintiff had not, as master, earned wages on board the *Chieftain* within the meaning of the Admiralty Court Act, 1861, and that the Court had not jurisdiction to entertain the plaintiff's claim for wages or disbursements, and that the defendants were intitled to priority over any such claim of the plaintiff.

The facts proved in evidence were as follows:—In March, 1862, the *Chieftain* was placed in the defendants' graving dock for repairs, and she there remained until the 25th of November, when she went into the Victoria Docks. On the 30th of May, 1862, the plaintiff was appointed master by Donald MacLarty, the then owner, by the following letter:—

" 30th May, 1862.

" Dear sir,

" I shall be glad if you will take charge of the *Chieftain* on the terms we spoke of, viz., 10*l*. a month and 5*l*. a month—in all

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15*l.* a month—with the usual and customary board wages and other expenses in port. We talked of commission on earnings, but that can be gone into before sailing. Keep an eye on the work and the shipkeeper, whom you will pay 1*l.* 1*s.* a week, and advise me regularly to the old address while in Liverpool.

“Yours truly,

“DONALD MACLARTY, junior.”

The plaintiff thereupon took charge of the ship, superintended the repairs, paid the shipkeepers, &c., and, on the ship coming off the pontoon, employed and paid men to pump her; and afterwards superintended the loading of the ship for Singapore (for which place she had been chartered), signed the bills of lading, shipped a crew, ordered ship's stores to a large amount, and otherwise transacted the ship's business. He did not, however, sleep on board the ship, except on one or two occasions. On the 16th of January, 1863, the ship was taken into possession on behalf of Messrs. Redfern & Co., but the plaintiff continued acting as master until the 25th of March, when he was discharged by Mr. Wilson, to whom Redfern & Co. had, on the 13th of March, sold the vessel. Meanwhile, on the 21st of January, 1863, the defendants had taken a mortgage of the ship from the owner on account of their debt, and Redfern & Co., having satisfied their own mortgage out of the proceeds of the sale, handed over the balance to the defendants, but with notice of the outstanding claim of the plaintiff. This balance was insufficient to pay the defendants' claim.

Cleasby, Q. C., and *Lushington*, for the plaintiff.—These were wages “earned on board the ship” within 24 Vict. c. 10, s. 10. The Court has, moreover, jurisdiction so far as the wages are concerned by the 191st section of the Merchant Shipping Act. The disbursements sued for were made by the plaintiff as master, and on account of the ship, and are therefore within the letter as well as the spirit of the Act of 1861.

Both these claims of the master come before any mortgage. Master's wages are preferred to a bottomry bond, *Salacia* (a); and to a mortgage claim, *Caledonia* (b); *Glentanner* (c); and there is no reason why master's disbursements should not stand on the same footing as his wages.

Further, the defendants are no longer mortgagees, nor have they any lien on the ship, nor any interest in this cause, because

(a) *Lushington*, 545.

(b) *Swabey*, 17.

(c) *Swabey*, 415.

the money paid to them by Redfern & Co. was not paid under a mistake of fact.

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Karslake, Q. C., and *Clarkson*, for the defendants.—The wages were not “earned *on board* the ship.” The phrase “on board” was no doubt advisedly used; it came probably from the 181st section of the Merchant Shipping Act, which appoints a seaman’s right to wages to commence “either at the time at which he commences work, or at the time specified in the agreement for his commencement of work or presence *on board*, whichever first happens.” If the claim for wages falls on this ground, the claim for disbursements will fall also.

Cleasby replied.

DR. LUSHINGTON.—This action is brought against the barque *Chieftain* and her freight by John Coward, suing as master for his wages and disbursements. An appearance was entered on behalf of the Thames Graving Dock Company, who claim an interest in the ship as mortgagees; and upon the facts stated in the pleadings and proved in evidence I have to decide whether the Court has jurisdiction to entertain the master’s claim, and whether, if so, it can be maintained against the claim of the defendants. Judgment.

It is perfectly clear, in my opinion, that the plaintiff was hired by MacLarty, the then owner of the ship, to be the master and to perform the duties of master of the ship, which was at that time in the graving dock undergoing repairs. I am also of opinion that there are very many duties which devolve upon a master when the ship is undergoing such repairs; in one word, the duties of superintendence, seeing that the necessary work is done and done rightly; for such matters cannot be satisfactorily accomplished without being overlooked by some confidential and experienced person. These duties I consider to be properly the duties of a master; they were performed by the plaintiff, and subsequently he discharged many other duties, which are also within the scope of the ordinary office of a master. Though he did not sleep on board more than once or twice, he was constantly on board looking after the ship’s concerns; he made the necessary disbursements for the ship; he hired the crew and paid them their wages; he superintended the loading of the ship and signed the bills of lading, and it was undoubtedly intended that he should command the ship on her voyage to Singapore. In short he did, to all intents and purposes, perform all those duties which appertain to the character of a master taking com-

The plaintiff was hired as master, and, though not sleeping on board, he transacted the necessary duties of master.

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His wages
were, there-
fore, "earned
on board the
ship" within
24 Vict. c. 10,
s. 10.

mand of a ship destined for a long voyage. He did not sail in the ship, because he was discharged by Mr. Wilson, who in the meantime had by purchase become the owner of the ship. Such are the facts of this case.

Upon these facts it is contended, on behalf of the defendants, that whatever claim the plaintiff may have against the shipowner who employed him, he cannot sue the ship in this Court, because the Court has not jurisdiction. This argument is founded on the 10th section of the Admiralty Court Act, which gives the Court "jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." The argument of Mr. Karlake—confining my attention for the present to the claim for wages only—is this, that the wages must be earned *on board* the ship in the most literal sense, and that the master has no claim in this Court if he did not live on board the ship. This construction of the statute would lead to many difficulties. I remember the time perfectly well, before steam-tugs came into use, when it was the custom for East Indiamen to go round to Deal, the master remaining behind in London to do the ship's business, and joining the ship again at Deal. Though circumstances are altered a similar course of proceeding might still sometimes be adopted. Could it be contended that the master suing for wages would not be intitled to recover wages during the period that the ship was going round to the final starting port; would the Court have to divide the case into fractions, when in point of reason there would be no principle whatever to support such a subdivision? Again, I might put the case of the celebrated Russian embargo, when the ships were detained for months and months in Russia, and during all that time most of the masters and crews, instead of remaining on board ship, stayed on shore for the sake of comfort, in consequence of the inclemency of the weather; and we all know it was held (a) that they were entitled to their wages, though they did not actually perform and could not perform their duties on board ship. Again, it might happen that in many of the extensive voyages which take place in the East, the master might be absent from the ship for a month, and yet might be performing most important and necessary duties for the interests of the owners, and for the completion of the voyage. I should therefore be most reluctant to put upon the statute the construction for which the defendants contend. But I also think that that construction is not the reasonable interpretation of the

(a) *Beale v. Thompson*, 4 East, 546; *Delamainer v. Winteringham*, 4 Camp. 186. The seamen, in these two cases, were imprisoned by the Russian Government.

words used. I am of opinion that the wages were earned on board the ship. The plaintiff was on board during the day, and whenever he was required. The words used are "earned on board," not "earned at sea," and I am of opinion that his wages were earned on board, although he did not sleep on board, and although his duty required him on many occasions to be absent from the ship, more especially for the purpose of going into the city, and there accelerating matters for the ship's voyage. Moreover, in this construction, which in all respects appears to me the reasonable one, I am confirmed by the 181st section of the Merchant Shipping Act, which Mr. Karslake has cited. That section enacts, that "a seaman's right to wages and provisions shall be taken to commence either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence on board, whichever shall first happen;" and the 191st section gives the master the same rights, liens and remedies for his wages that the seaman has for his wages. If, then, the seaman may be intitled to wages from the time specified in his agreement for his commencement of work or presence on board, though in point of fact, through the interposition of other orders, his work on board does not then actually commence, the master must have a similar right. I cannot, therefore, hesitate in pronouncing that the Court has jurisdiction over the plaintiff's claim for wages.

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The defendants, however, then say that the plaintiff's claim cannot prevail against their interest, which I will assume to be that of mortgagees. Now, a mortgagee stands in the shoes of the owner, and can set up no defence in this Court, except what the owner can set up. This has been the practice of the Court for many years: it allows the mortgagee to come in and defend, but it confines his right of defence to the defences competent to the owner. As it is manifest that the owner would have no defence here to the plaintiff's claim for wages, so neither have the defendants as mortgagees. The defendants have disclaimed relying upon the 4th section of the Admiralty Court Act, or upon the fact of their having furnished necessaries to the ship; and as common creditors, indeed, it is clear that they have no *persona standi* here.

The defendants, as mortgagees, have no better rights of defence than the shipowner.

There remains then only the question as to the disbursements. The argument against the right of the master is that he could only recover disbursements made by him whilst he was earning wages on board the ship. But I have already decided that the master was earning wages on board the ship within the meaning of the Act, and therefore the objection to the claim for disbursements fails also.

The master has also a lien for his disbursements.

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I have no doubt that the master is intitled to the lien he claims both for wages and disbursements. I regret that an innocent party should be the loser ; but both parties are innocent, and if I adopted the argument of the defendants I should be throwing great confusion into proceedings brought by masters. I should then have to decide when the master's duties commenced on board, in the most literal and exclusive sense—when they ended, when they began again—for what period a claim could be made, and for what not ; whilst we all know that the practical duties of a master begin, not when the ship sails, but long before—that those duties are not confined to duties on board the ship, and that they are most important to the success of the voyage and the safety of the ship. In the present case I pronounce for the claim of the master.

Stocken, solicitor to the plaintiff.

Cotterill & Sons, solicitors to the defendants.

A second action had been entered by the master for his wages from the date of the institution of the first cause to the date of his discharge. The learned Judge pronounced for this claim also.



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In the Privy Council.

Present—LORD CHELMSFORD,
LORD KINGSDOWN,
The LORD JUSTICE KNIGHT BRUCE.

THE CARRIER DOVE.

Collision—Defence of Licensed Pilot—Burden and Degree of Proof—17 & 18 Vict. c. 104, s. 388.

In a case of collision, a defendant relying upon the statutory defence (17 & 18 Vict. c. 104, s. 388) that the accident was occasioned by the default of a pilot acting in charge of the ship, and employed by compulsion of law, is bound to give strict proof that the collision was occasioned by the pilot's default and by that only.

Where, therefore, the improper navigation of the defendant's vessel consisted in getting under way for the purpose of docking, under circumstances which rendered that proceeding dangerous to other vessels, and the defendant only proved that the pilot (as well as the captain) was on deck giving general orders, but did not prove the particular order, nor produce the pilot as a witness: *Held* (affirming the judgment of the Court of Admiralty), that the defendant remained liable for the damage.

THIS was an action brought by the owner of the ship *City of Ottawa* against the ship *Carrier Dove* to recover damages occasioned by a collision, which took place between the two vessels on the 20th of October, 1862.

The accident occurred in squally weather in the river Mersey, while the *Carrier Dove*, assisted by a steamer, was heaving in chain for the purpose of getting under way and docking (an order for which had been brought off by the master). A violent squall struck the ship, and drove her upon the *City of Ottawa*, which was also anchored in the river. The defence raised was—1. Inevitable accident; 2. That the accident was occasioned by the default of the pilot acting in charge. (17 & 18 Vict. c. 104, s. 388.) It was proved that the pilot as well as the captain was on the deck of the *Carrier Dove* at the time, but no evidence was given to show that it was solely by and in consequence of the pilot's orders that the chain was being hove in, except that he was on the forecastle, attending to the tug and the chain, and giving orders from time to time. The pilot himself was not called.

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The Judge of the Admiralty Court in giving judgment said :—
“The following resolution has been come to by the Trinity Masters and myself—That as regarded the safety of other ships lying in the river, the proceeding to cross the river under the circumstances was a measure not consistent with ordinary caution. There is no proof that this was the fault of the pilot, and I must therefore pronounce for the damage.”

From this judgment the defendant, the owner of the Carrier Dove, appealed.

Aspinall and *Lushington* for the appellant.—The fault was of the pilot, and the pilot only. As a matter of fact, the pilot was on the forecastle, his proper station, carrying on in the usual manner. As a matter of law, it was his duty to superintend the docking of the ship, to determine therefore whether it was safe and proper in the circumstances to get under way for that purpose and cross the river with a single steamer; if that was not proper, then it was his duty to control the captain, and countermand proceeding. As the superior officer present, or in the words of the statute “acting in charge,” necessarily seeing what was going on and not interfering, the act of proceeding was his act and his act only. It was his act because the captain only acted as his subordinate: if the order to heave in was in fact the captain’s, which does not clearly appear, it was adopted by the pilot, as must be implied from his acquiescence. It was also the pilot’s act only, because the authority of the captain merged in that of the pilot. In truth the order of the captain, if given with the apparent authority of the pilot, was not negligence, was not a want of ordinary caution: but the pilot should have known better. These circumstances, from which the authority of the pilot is clearly to be implied, distinguish this case from the *Schwalbe* (a), where the pilot disclaimed on oath having given the improper order. [They also argued that the collision was an inevitable accident.]

Brett, Q. C., and *Potter*, for the respondent, were not called upon.

LORD CHELMSFORD.—The collision in this case took place in the river Mersey, on the 20th of October, 1862, between the City of Ottawa and the Carrier Dove. The City of Ottawa was lying at anchor in the Mersey, having a bright light hung at the forestay. The Carrier Dove was lying at a single anchor

(a) *Lushington*, 239.

lower down the river, having lost one of her anchors the day before; she was engaged in heaving on her remaining anchor, with a steam-tug, the Enterprise, towing her ahead, and she was intended to be docked the next tide. A violent squall arose, and the Carrier Dove dragged her anchor; she payed out chain for the purpose of bringing her up, but in vain, and her stern and port quarter came upon the starboard bow of the City of Ottawa, and occasioned the damage.

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The owner of the Carrier Dove offered two answers to this case—the first, that it was not a case of negligence, but of inevitable accident; and secondly, that if it were a case of negligence, the Carrier Dove had a licensed pilot on board, who was in charge of the vessel at the time, and that the owner was therefore exonerated from liability.

With respect to the case of negligence, that depends entirely upon whether it was prudent, in the then state of the weather, for the person in charge of the Carrier Dove to take measures for crossing the river to dock the vessel. Now, upon this fact there is conflicting evidence, upon which the learned judge of the Court of Admiralty, with the assistance of the Elder Brethren of the Trinity House, came to the conclusion “that, as regarded the safety of ships lying in the river, the proceeding to cross the river under the circumstances was a measure not consistent with ordinary caution.” Now, upon the principles of which we have, over and over again, stated that the Committee acts in these cases, we should have been very unwilling to have come to any different conclusion, even if the Nautical Assessors, whose assistance we have, had formed a different opinion upon the subject, but I am happy to say that they concur entirely in the view that was taken by the Court below; and they think that to move the Carrier Dove in the then state of the weather was most hazardous, not consistent with skill and caution, and liable to endanger other vessels.

Then the only remaining question is, whether the accident which occasioned the injury was solely attributable to the pilot. It may be taken for granted on the evidence that there was a licensed pilot on board, and there is no doubt about it; but the appellant asks the Committee to presume that the heaving on the anchor for the purpose of proceeding to dock the vessel was his act, on the ground that he was proved to have been on the forecastle at the time, and that it was his duty to dock the vessel. Now there can be no presumption made in favour of the owner, because he can only exonerate himself from liability by *proving* that the act which occasioned the injury was the sole act of the pilot. It is not necessary to repeat in terms but only

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affirmed.

to refer to what was read a short time ago, viz., the opinion of the Committee in the case of the *Schwalbe*, that the onus probandi in these cases lies on the owners of the ship. Here the owner could have removed any presumption, one way or the other, by calling the pilot to prove the fact: failing to do so, he cannot, as the onus probandi is upon him, call upon the Committee to presume that the act was the act of the pilot, and that the pilot was solely to blame, both which facts are necessary in order to exonerate the owner from his liability. Under these circumstances their Lordships have no difficulty in affirming the sentence of the Court below and dismissing the appeal with costs.

Loftus and Young, solicitors for the appellant.

Tebbs and Son, proctors for the respondent.

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Present—LORD KINGSDOWN.

DR. LUSHINGTON.

SIR EDWARD RYAN.

THE LACONIA.

Consular Court at Constantinople—Jurisdiction over British and Foreign Subjects—6 & 7 Vict. c. 94—Order in Council, 27th August, 1860—Admiralty Jurisdiction—Rule as to dividing Damages in Collision Cases.

In almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian state, and the intercourse between two Christian nations.

As between two Christian states, all claims for cession of jurisdiction or exemption from jurisdiction within the territory of the other require, generally at least, the sanction of a treaty : but may nevertheless be proved by evidence of consent otherwise ; and such consent may be expressed by usage and conscious acquiescence ; especially in transactions with Oriental states.

The Ottoman government has for a long time acquiesced in allowing to the British consular authorities in Turkey a jurisdiction between British subjects and the subjects of other Christian states.

Such acquiescence of the Ottoman government does not vest a compulsory power in a British Court in Turkey over the subjects of other foreign states ; but the foreigner may voluntarily submit to its jurisdiction with the consent of his sovereign.

The effect of the 6 & 7 Vict. c. 94, is to make the jurisdiction of the British consular authority in the Ottoman empire liable to be regulated by Order in Council ; and the Order in Council, 27th August, 1860, provides for the exercise of such jurisdiction in suits between British subjects and the subjects of foreign states.

The nature and extent of the consular jurisdiction must be solved by reference to usage. The Consular Court has exercised a customary jurisdiction in rem in cases of bottomry, whence the right to exercise a similar jurisdiction in cases of collision may be inferred.

The jurisdiction being in rem, the rules applying to actions in rem apply rather than the rules of the English common law in personal actions ; and, therefore, if both parties are to blame for a collision, the damages ought to be divided.

The Order in Council 9th January, 1863, confirms rather than confers the Admiralty jurisdiction of the Consular Court.

COLLISION. These were appeals from the judgment of Her Majesty's Supreme Consular Court at Constantinople in two cross-actions tried there.

On the 20th of March, 1862, the screw steamer *Laconia*, owned by George Papayanni and other persons resident in England, and the screw steamer *Colchide*, belonging to the Russian Steam Navigation and Trading Company, a company incorporated by

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an ukase of the Emperor of Russia, came into collision in the Sea of Marmora, whereby the Colchide and her cargo with some fifty of her passengers and crew were lost.

On the 19th of April following, the owners of the Colchide having, pursuant to Art. 64 of the Order in Council of the 27th of August, 1860, obtained and filed the requisite consent in writing of the Russian Consul General at Constantinople to submit, and having submitted to the jurisdiction of her Majesty's Supreme Consular Court, and having given security to the satisfaction of the Court to abide by and perform such decision as might be given by that Court, instituted a suit *in rem* against the Laconia, then undergoing repairs at Constantinople. The petition by which the proceedings were commenced claimed the sum of 43,000*l.* as damages to the plaintiffs, and for that amount the Laconia was arrested by the Supreme Consular Court. The owners of the Laconia protested against the right of the plaintiffs to bring the action on the ground that the Court had no jurisdiction in the matter. Counsel on both sides having been heard on the subject matter of the protest, the following judgment was delivered by Sir Edmond Hornby, the Judge of the Supreme Consular Court, on the 22nd of May, 1862.

The Court affirms its jurisdiction, not on the ground that it is a Court of Admiralty, or that it has jurisdiction in all cases taken cognizance of by Courts of Admiralty, but simply on the ground that it has jurisdiction in cases of collision within Turkish waters, and that it can exercise that jurisdiction *in rem* as well as *in personam*.

The Court further observes, that, although it is true no mention of a jurisdiction in actions *in rem* is specially made in the Order in Council of the 27th August, 1860, yet, under the 26th section of that order, "all jurisdiction, power, and authority, legal, equitable, *or other*, which "any consul of Her Majesty, by custom, has or may exercise in the dominions of the Sublime Ottoman Porte," is specially reserved to Consular Courts, and there is no doubt that consuls in the Levant have customarily exercised, and still continue to exercise, jurisdiction over ships in the sense of ordering their detention and sale. In actions on bottomry bonds, vessels are constantly stopped, sequestered, and sold.

Claims are marshalled and satisfied by sale of the *res*, and indeed the rules of the maritime law in the apportionment of damages in cases of collision have been followed.

The Court also calls attention to the 4th, 5th, and 13th sections of the Order in Council.

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It is not to be doubted but that Her Majesty has in the Levant jurisdiction *in rem* as well as *in personam*, in other words, that she has a jurisdiction in admiralty in the same way as she has a common law and equity jurisdiction, for such jurisdiction would naturally follow any cession or conquest of territory.

By the 4th section all the jurisdiction, whatever it may be, is to be exercised under and according to the provisions of the Order in Council. By the 5th section "such jurisdiction is to be exercised, so far as circumstances will admit, in conformity with the common law, the rules of equity, the statute law, and *other law* for the time being enforced in England." This section therefore contemplated the exercise of jurisdiction in conformity with some other law than the common or statute law, and it is fair to presume that by this term, "*other law*," was meant, if occasion should arise for its application, the maritime law, and when reference is made to the reservation contained in the 26th clause, it is clear that Her Majesty intended to delegate to Consular Courts, established under the order in question, the power to exercise *all* her jurisdiction in the Levant, other than the common law, rules of equity, and statute law which the consuls had, by custom, exercised in the dominions of the Sublime Ottoman Porte.

The Court also draws attention to the fact that practically as between the different foreign Consular Courts in the Levant, much proceeds from and depends on a principle of reciprocity. To a great extent custom has created a certain uniformity and consensus of action with reference to the exercise of different jurisdictions possessed by the different Consulates, and for the Supreme Court to declare now that it will no longer recognize a custom so long observed, generally known, and acted on, of stopping ships, to answer claims upon them, would be productive not only of great inconvenience but of great injustice, as in a great many cases individuals who had suffered grievous wrong and injury would be practically without remedy.

To take the present case as an instance, the result of leaving the remedy which the plaintiffs in this action claim to have for the undoubted loss they have sustained, to be enforced against the captain of the *Laconia*, would be practically, in all probability, to deprive them altogether of the compensation to which, if they are justified in the claim they make, they would be intitled, because it is absurd to suppose that the captain is worth 40,000*l*. The owners are not within the jurisdiction of this Court, and, in all probability, it would be impossible to carry on this action with any chance of success in England, in consequence of the difficulties attending the utter absence of jurisdiction over

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witnesses in this country, from the variety of independent nationalities, and, so far as the ship itself is concerned, she might be sold here, or otherwise disposed of, and never be placed within the jurisdiction of the English Court of Admiralty.

The owners of the *Laconia* obtained leave to appeal to her Majesty in Council against this judgment, and then filed their answer on the merits.

On the 4th of June a petition was filed by leave of the Supreme Consular Court, whereby the owners of the *Laconia* claimed 10,000*l.* damages in a cross-action against the Russian Steam Navigation and Trading Company; and an order was subsequently made that that Company should come in and submit to the jurisdiction of the Supreme Consular Court in the action wherein they were defendants, and that they should give security for the execution of any judgment which might be given against them therein; further proceedings in their action against the *Laconia* to be stayed in default of their so doing. The owners of the *Colchide* complied with the order; and both actions came on for trial before Mr. Legal Vice-Consul Francis, sitting as Judge of the Supreme Consular Court, and two assessors.

On the 5th of November judgment was given that both vessels were to blame; and that each party should bear a moiety of the total damage resulting from the collision. Against this judgment, as well as against the judgment on their protest to the jurisdiction, the owners of the *Laconia* appealed (*a*).

The history of British Consular Jurisdiction in the Levant, and more especially at Constantinople, may be gathered from the following statement, and the statutes and orders in council, the material portions of which are set out.

By letters patent of King James I. in 1606, the corporation called "The Governor and Company of Merchants of England trading to the Levant Seas," was constituted and endowed with certain rights and privileges. These were confirmed by *letters patent of King Charles II., 1662*, whereby further authorities and privileges were granted to the company, including a power to appoint consuls and vice-consuls in all the places in the dominions of the Grand Seignior, and other places in the Levant Seas; such consuls and vice-consuls to have authority to govern

(*a*) The owners of the *Colchide*, having, through misapprehension of the practice prevailing in appeals to the Privy Council, failed to obtain leave of the Court below for that purpose, were allowed by the Judicial Committee to enter cross-appeals against the judgments on the merits on payment of the costs of the application. On the question of the jurisdiction there was naturally no cross-appeal; and the owners of the *Laconia* were, therefore, throughout the argument—as they are in this report—termed the appellants.

all merchants being subjects of His Majesty, and to administer to them full, speedy and upright justice in all their complaints, causes and contentions among them, begun and to begin in the said dominions, and to pacify all manner of discords among them, for the better government of the said merchants. The bye-laws of the company, revised from time to time, and apparently for the last time in the year 1821, directed the consuls and vice-consuls to exercise these powers.

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The rights of the company and the trade to the Levant were regulated from time to time by various statutes in the reigns of George II. and George III., which are recited and repealed by 6 Geo. IV. c. 33, which in effect dissolved the company, and transferred their property to the Crown, and vested their lawful rights of jurisdiction over His Majesty's subjects resorting to the ports of the Levant in consular officers, appointed by His Majesty.

The capitulations and articles of peace between Great Britain and the Ottoman Empire, as agreed upon, augmented and altered at different periods, had been finally confirmed by the treaty of peace concluded at the Dardanelles in 1809 (*a*).

By the 16th and 24th articles of this treaty the Sultan agreed as follows :—

“16. That if there happen any suit or other difference or dispute among the English themselves, the decision thereof shall be left to their own ambassador or consul, according to their custom, without the judge or other governors, our slaves, intermeddling with them.”

“24. That if any Englishman or other subject of that nation shall be involved in any law-suit, or other affair connected with law, the judge shall not hear nor decide thereon until the ambassador, consul, or interpreter shall be present; and all suits exceeding the value of 4,000 aspers shall be heard at the Sublime Porte, and nowhere else.”

6 & 7 Will. IV. c. 78, Title and Sections 1 and 2.—“An Act to enable His Majesty to make Regulations for the better defining and establishing the Powers and Jurisdiction of his Majesty's Consuls in the Ottoman Dominions. [13th August, 1836.]

“Whereas by the treaties and capitulations subsisting between His Majesty and the Sublime Ottoman Porte, full and entire jurisdiction and control over British subjects within the Ottoman dominions, in matters in which such British subjects are exclu-

(*a*) 2 Hertsalett's Treaties, 346.

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sively concerned, is conferred upon the British ambassadors and consuls appointed to reside within the said dominions: And whereas it is expedient for the protection of British subjects within the dominions of the Sublime Porte in Europe, Asia and Africa, and likewise in the states of Barbary, as well as for the protection of His Majesty's ambassadors, consuls, or other officers appointed or to be appointed by His Majesty for the protection of the trade of His Majesty's subjects in the said ports and places, that provision should be made for defining and establishing the authority of the said ambassadors, consuls, and other officers: Be it therefore enacted, that it shall and may be lawful for His Majesty from time to time, by any order or orders of His Majesty in council, to make and issue any directions and regulations touching and concerning the rights and duties, jurisdiction and authority, criminal as well as civil, over His Majesty's subjects residing at or resorting to the ports or other places within the dominions of the Sublime Ottoman Porte in Europe, Asia and Africa, and likewise in the states of Barbary, to be exercised and performed by His Majesty's ambassadors, consuls, or other officers appointed or to be appointed by His Majesty for the protection of the trade of His Majesty's subjects in the ports and places before mentioned, and to establish forms of proceeding in all matters coming under the cognizance of the said ambassadors, consuls, or other officers, in virtue of such order or orders in council; and to impose penalties, forfeitures, or imprisonments for the breach of any such directions or regulations, to be enforced in such manner as in the said order or orders shall be specified; and the said ambassadors, consuls and other officers are hereby authorized and required to obey and enforce the said regulations and directions, and the same shall be effectual and binding upon all subjects of His Majesty residing at or resorting to the said ports and places for the purposes of trade or otherwise."

2. "And whereas cases occasionally arise within the dominions of the Ottoman Porte above specified, and in the states of Barbary, wherein the interposition of His Majesty's ambassadors, consuls, or other officers is required by the subjects of other Christian powers in the determination of differences or disputes between such persons and British subjects: Be it therefore enacted, that it shall be lawful for His Majesty, by any order or orders in council, to make and issue in the same manner directions and regulations for the guidance of his ambassadors, consuls, and other officers, and of all other subjects of His Majesty, in cases in which the interposition of His Majesty's ambassadors, consuls, or other officers may be so required for the settlement of

any differences or disputes which may arise between British subjects and the subjects of any Christian power within the dominions of the Sublime Porte in Europe, Asia and Africa, and in the states of Barbary : provided always, that every order in council issued by the authority of this Act shall be published in the *London Gazette*, and shall be laid before both Houses of Parliament, and shall not be binding and effectual until six months after it shall have been so laid before both Houses of Parliament."

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6 & 7 Vict. c. 94, the Title and Sections Nos. 1, 2 and 3.—
"An Act to remove Doubts as to the exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and to render the same more effectual.
[24th August, 1843.]

1. "Whereas by treaty, capitulation, grant, usage, sufferance and other lawful means Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions, and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it is and shall be lawful for Her Majesty to hold, exercise and enjoy any power or jurisdiction which Her Majesty now hath or may at any time hereafter have within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory."

2. "And be it enacted, that every act, matter and thing which may at any time be done, in pursuance of any such power and jurisdiction of Her Majesty, in any country or place out of Her Majesty's dominions, shall in all courts, ecclesiastical and temporal, and elsewhere within Her Majesty's dominions, be and be deemed and adjudged to be in all cases and to all intents and purposes whatsoever, as valid and effectual as though the same had been done according to the local law then in force within such country or place."

3. "And be it enacted, that if in any suit or other proceedings, whether civil or criminal, in any Court, ecclesiastical or temporal, within Her Majesty's dominions, any issue or question of law or of fact shall arise, for the due determination whereof it

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shall in the opinion of the Judge or Judges of such Court be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, it shall be lawful for the Judge or Judges of any such Court, and he or they are hereby authorized, to transmit under his or their hand and seal, or hands or seals, to one of Her Majesty's principal Secretaries of State, questions by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such Secretary of State is hereby empowered and required within a reasonable time in that behalf to cause proper and sufficient answers to be returned to all such questions, and to be directed to the said Judge or Judges, or their successors; and such answers shall upon production thereof be final and conclusive evidence in such suit or other proceedings of the several matters therein contained and required to be ascertained thereby."

Order in Council of the 27th of August, 1860.

"Whereas by the Act of the Session of Parliament of the sixth and seventh years of Her Majesty's reign (chapter ninety-four), intituled 'An Act to remove Doubts as to the exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and to render the same more effectual,' hereinafter called 'The Foreign Jurisdiction Act,' it was enacted (amongst other things), that it was and should be lawful for Her Majesty to hold, exercise and enjoy any power or jurisdiction which Her Majesty then had or might at any time thereafter have within any country or place out of Her Majesty's dominions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory:

"And whereas Her Majesty has had and now has power and jurisdiction in the dominions of the Sublime Ottoman Porte
 * * * :

"And whereas it hath seemed to Her Majesty, by and with the advice of her Privy Council, to be expedient at the present time to revise and consolidate the provisions of the said Orders and to make further provision for the due exercise of Her Majesty's power and jurisdiction aforesaid, and for the more regular and efficient administration of justice and the better maintenance of order among all classes of Her Majesty's subjects and of persons enjoying Her Majesty's protection resident in or resorting to the dominions of the Sublime Ottoman Porte:"

"Art. 4. All Her Majesty's jurisdiction exerciseable in the

dominions of the Sublime Ottoman Porte for the judicial hearing and determination of suits or matters in difference between British subjects, or between British subjects and the subjects of the Sublime Ottoman Porte, or between British subjects and subjects or citizens of any other state, or for the administration or control of the property or persons of British subjects, or for the repression or punishment of crimes or offences committed by British subjects, or for the maintenance of order among British subjects or for any purpose connected therewith respectively, shall be exercised under and according to the provisions of the present Order and not otherwise.

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“Art. 5. Subject to the other provisions of the present Order the civil and criminal jurisdiction aforesaid may and shall, as far as circumstances will admit, be exercised upon the principles of and in conformity with the Common Law, the Rules of Equity, the Statute Law and other law for the time being in force in and for England, and with all the powers vested in and pursuant to the course of procedure and practice observed by and before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities.”

“Art. 13. All Her Majesty’s jurisdiction civil and criminal exerciseable in the dominions of the Sublime Ottoman Porte shall for and within the district of the Consulate General of Constantinople be vested exclusively in the Supreme Consular Court as its ordinary original jurisdiction.

“Art. 14. All Her Majesty’s jurisdiction civil and criminal exerciseable in the dominions of the Sublime Ottoman Porte beyond the district of the Consulate General of Constantinople and not under the present Order, vested exclusively in the Supreme Consular Court, shall to the extent and in the manner provided by the present Order be vested in the several Provincial Consular Courts each for and within its own district.”

“Art. 26. The Supreme and every other Consular Court shall be a Court of Law and Equity, and (subject to the other provisions of the present Order) shall have and may exercise all jurisdiction, power and authority, legal, equitable, or other, which any Consul of Her Majesty by custom has or may exercise in the dominions of the Sublime Ottoman Porte.”

“Art. 64. The Supreme or other Consular Court, according to its respective jurisdiction, original or appellate (as the case may require), and in conformity with the rules relating to suits between British subjects and appeals therein, may have and determine any suit, proceeding or question of a civil nature instituted, taken or raised by a British subject against a subject of the Sublime Ottoman Porte, or a subject or citizen of

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any other State in amity with Her Majesty, or by a subject of the Sublime Ottoman Porte, or a subject or a citizen of any other State in amity with Her Majesty against a British subject:

“ Provided that the subject of the Sublime Ottoman Porte, or the subject or citizen of such other State as aforesaid, obtains and files in such Court the assent in writing of the competent local authority on behalf of the Sublime Ottoman Porte, or of the Consul of such other State (as the case may be) to his submitting, and does submit, to the jurisdiction of the Supreme or other Consular Court, and, if required, gives security to the satisfaction of the Court, by deposit or otherwise, to pay fees, damages, costs and expenses, and abide by and perform any such decision as may be given by the Supreme or other Consular Court originally or on appeal (as the case may require.)”

On the 10th and 11th of July, 1863, the argument on the question of jurisdiction was heard.

Brett, Q.C., and Vernon Lushington for the owners of the *Laconia*.—There are three questions to be considered in order to determine whether the Judge of the Supreme Consular Court at Constantinople had jurisdiction to entertain and decide the action against the *Laconia* in the way he has done. (1.) Has that Court jurisdiction in suits between Russian plaintiffs and British defendants? (2.) Supposing the Court had jurisdiction to try a case between such parties, was it authorized to exercise an Admiralty jurisdiction by a proceeding in rem? (3.) Was it justified in following the practice of the English Admiralty Court by dividing the damages?

(1.) It would be contrary to the law of nations to hold that the Queen can have any jurisdiction in Turkey, even in a case between two of her own subjects, unless such jurisdiction had been granted by treaty; but even a treaty whereby the Sultan conceded such a jurisdiction to her Majesty would not bind the subjects of other foreign States—a Russian subject for instance. It is no answer to this objection to say that in the present case the Russian subjects have consented. The consent of a party cannot give jurisdiction. A Russian in Constantinople is not within British jurisdiction, and a British Court there could have no power to enforce a judgment against him. Surely, then, a Russian ought not to be allowed to enforce a judgment in that Court against a British subject. But the Turkish Government

never has assented to the exercise by her Majesty of any jurisdiction between her subjects and foreigners. All the treaty rights of the English Crown in Turkey are confirmed and recapitulated in the Treaty of the Dardanelles of 1809 (*a*); and Art. 16 of that treaty—the only article by which the right of exercising any jurisdiction is conferred upon British authorities in Turkey—expressly limits that jurisdiction to “any suit or other difference among the English themselves.” The respondents will, however, contend that the statute 6 & 7 Will. IV. c. 78, enabled the Sovereign of England by virtue of Orders in Council to authorize his consuls in the Levant to exercise jurisdiction in suits between British subjects and foreigners. It is difficult to understand how an Act of Parliament could authorize His Majesty to regulate the exercise by his officers in Turkey of a jurisdiction which he did not possess. A careful consideration of the Act in question will show that such is not the case. The real object of that Act, as the preamble shows, was to protect consuls, who were not then judicial officers, and who were consequently liable to actions against them for acts done in the exercise of the jurisdiction they assumed. Sect. 2 provides “that it shall be lawful for His Majesty, by any Order or Orders in Council, to make and issue in the same manner directions for the guidance of his ambassadors, consuls, and other officers, and of all other subjects of His Majesty, in cases in which the interposition of His Majesty’s ambassadors, consuls, or other officers, may be so required for the settlement of any differences or disputes which may arise between British subjects and the subjects of any Christian power within the dominions of the Sublime Porte in Europe, Asia and Africa, and in the States of Barbary.” The appellants submit that this section only authorizes the regulation by Order in Council of the sort of interference of consuls in disputes between British subjects and foreigners which has always formed an important part of their functions, viz., the exertion of their influence for the purposes of reconciliation and the amicable settlement of matters in difference, and not to the exercise of a compulsory jurisdiction such as that exercised by the Supreme Consular Court in the present case. This is the more apparent when we contrast the words of the 2nd section with those of the 1st. The 2nd section, which relates to cases in which foreigners are concerned on one side and British subjects on the other, speaks of the “interposition” of His Majesty’s consuls where it may be required in such cases; and authorizes His Majesty by Order in Council to

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(*a*) 2 Hertslett’s Treaties, 350.

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regulate such interposition. There is not one word about *jurisdiction*, neither is any compulsory authority of the consuls in such cases mentioned; whereas in the first section, which treats of cases in which British subjects alone are concerned, His Majesty is authorized to regulate by Order in Council "the rights and duties, jurisdiction and authority, criminal as well as civil, over His Majesty's subjects residing at or resorting to the ports or other places within the dominions of the Sublime Ottoman Porte;" and the same section goes on to provide that "the said ambassadors, consuls, and other officers, are hereby authorized and required to obey and enforce the said regulations and directions, and the same shall be effectual and binding upon all subjects of His Majesty residing at or resorting to the said ports and places for the purposes of trade or otherwise." The 6 & 7 Will. IV. c. 78, was repealed by the Foreign Jurisdiction Act 6 & 7 Vict. c. 94. It is by virtue of this latter Act, and of the Order in Council of the 27th of August, 1860, made thereunder, that the Supreme Consular Court claims to exercise jurisdiction in this cause. This statute, it must be observed, unlike the 6 & 7 Will. IV. c. 78, applies to divers countries and places out of Her Majesty's dominions and is not confined to the Ottoman territory. It is important to bear this in mind, because it will be said by the respondents that Her Majesty's jurisdiction in Turkey is not limited to that granted by treaties and capitulations, but that much of her jurisdiction is derived from usage and sufferance; and in point of fact, sect. 1 recites, that "whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty has power and jurisdiction within divers countries and places out of Her Majesty's dominions," &c. The appellants however submit that jurisdiction by usage and sufferance can only be set up as applicable to countries with which Her Majesty has no jurisdiction by treaty or other express grant, and cannot be claimed in such countries as Turkey, where the jurisdiction ceded to Her Majesty by the Sultan is defined and limited by the express stipulations of treaties. *Expressum facit cessare tacitum* is the maxim which must avail, a maxim recognized by the legislature when in passing the 6 & 7 Will. IV. c. 78, a statute applicable to the Ottoman dominions alone, it recites the treaties and capitulations subsisting, but says nothing of usage or sufferance. Moreover a jurisdiction in the dominions of a sovereign state can only be acquired by usage and sufferance in uncivilised and savage countries: but Turkey was, by the Treaty of Paris of 1856, admitted into the family of European nations (a). If we inquire

(a) Wheaton's International Law, Ed. 1863, p. 23.

whether as a matter of fact British consuls have exercised in the Levant a jurisdiction over suits between British subjects and foreigners, we shall find that they have not. In a letter of Messrs. Kaye, Freshfield & Kaye, the solicitors to the Levant Company, dated the 8th of June, 1812, those gentlemen say, "It seems scarcely necessary to state that though the consul may use his influence with a British subject to induce him to do justice to a foreigner, yet he cannot decide between them, because his doing so presumes a power to decide against a foreigner, which he has no right to do, nor can it be material he should have any such right, as the authorities of the country are open to foreigners, whose case will be decided upon in the proper Courts" (a). That letter was written before the dissolution of the Levant Company by the 6 Geo. IV. c. 33, but immediately after the passing of that Act we have the opinion of the law officers of the Crown published in the same Report (b). That opinion, given at the request of Mr. Canning, is dated the 23rd September, 1826, and signed by Sir Christopher Robinson, Sir Charles Wetherell and Sir N. C. Tindal. They say:—"In obedience to your commands we have the honour to report, that we are of opinion that all such rights and duties of jurisdiction and authority over His Majesty's subjects resorting to the ports of the Levant for trade or otherwise, as were legally exercised and performed by the consuls and other officers appointed by the Levant Company, before the surrender of their charters, may now be legally exercised and performed by ambassadors, consuls or officers appointed by His Majesty under the operation of sect. 4 of the statute 6 Geo. IV. c. 33." In the same Report (c), there is a letter from Sir John Dodson, the King's Advocate, to Lord Palmerston, dated 29th October, 1834, in which he says—"With respect to suits of a civil nature between British subjects and foreigners, I am clearly of opinion that where the British subject is plaintiff, and the foreigner defendant, the British consul can have no jurisdiction; and highly desirable as it may be, and as I conceive it is, under the circumstances, and for the reasons stated by Colonel Campbell, that the British consul should have jurisdiction in cases where the foreigner is plaintiff and the British subject defendant, I entertain great doubts whether the British consul has a strict legal right to adjudicate

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(a) Report of the Select Committee on Consular Establishments, printed by order of the House of Commons of the

10th of August, 1835, Appendix, p. 178.

(b) Appendix, p. 183.

(c) Appendix, pp. 186, 187.

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between them. The power is expressly disclaimed by the Levant Company for their consuls in the documents of the 8th November, 1812, referred to by Colonel Campbell. It does not appear to have been exercised, whether legally or otherwise, by the consuls of the company, and therefore could not have devolved upon the consuls of His Majesty under the statute before mentioned. Under these circumstances I humbly submit to your Lordship that it would be proper to resort to the legislature on the subject, and that it would be inexpedient to send out further instructions to the consuls until the statute shall have passed." We have already pointed out to what extent the statute did authorize the interference of His Majesty's consuls in such cases.

It will not be pretended that the later Act, the Foreign Jurisdiction Act, *conferred* on Her Majesty any jurisdiction in the Ottoman dominions. All it professes to do is to enable Her Majesty to exercise the power and jurisdiction which she previously had over her own subjects there, "in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." Any Order in Council therefore affecting to go beyond that is invalid. That Her Majesty's jurisdiction in Turkey is confined to her treaty rights was manifestly the opinion of the English Government in 1844, when, in transmitting the first Order in Council made under the Foreign Jurisdiction Act, Lord Aberdeen, in his memorandum dated the 2nd of July, 1844 (*a*), says:—"The right of British consular officers to exercise any jurisdiction in Turkey in matters which in other countries are exclusively under the control of the local magistracy, depends originally on the extent to which that right has been conceded by the Sultans of Turkey to the British Crown, and therefore the right is strictly limited to the terms in which the concession is made." This is in strict conformity with the doctrine of international law as recognized in a variety of cases, and which is very clearly expressed in the judgment of the Supreme Court of the United States of America in the case of the *Betsey* (*b*). Jay, C. J., delivering the judgment of the Court there says:—"No foreign power can of right institute or erect any Court of judicature of any kind within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties. It is therefore decreed and adjudged that the Admiralty jurisdiction which has been exercised in the United States by the

(*a*) Printed in Papers relating to the Jurisdiction of Her Majesty's Consuls in the Levant, 1845, p. 11.
 (*b*) 3 Dallas, 6—16.

consuls of France, not being so warranted, is not of right."

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And in the case of the schooner *Exchange* (a) it is said in the judgment of the same Court :—"The jurisdiction of Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." The appellants accordingly submit that art. 64 of the Order in Council of the 27th August, 1860, in conferring jurisdiction on the English Consular Courts in Turkey in cases between British subjects and foreigners, confers a jurisdiction of which Her Majesty is not possessed ; that it is consequently ultra vires and of no effect.

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In an analogous case, the law officers of the Crown seem to have thought that an Order in Council issued under similar circumstances was invalid. On the 28th of July, 1850, an Order in Council (b) was made conferring on Her Majesty's consuls at Siam, amongst other powers, authority to try cases between British subjects and foreigners. After that authority had been exercised doubts of its legality arose, and an Act of Parliament (c) was passed to confirm the Order in Council. As a question of international law it is difficult to see how the Act of Parliament made matters better ; but the appellants submit that nothing short of an Act of Parliament should induce this Court of Appeal to hold art. 64 of the Order in Council now in question valid.

Before dealing with other parts of the Order in Council there is one point to which it is proper to call attention. Sect. 3 of the Foreign Jurisdiction Act provides that in any suit or other proceedings in any Court within Her Majesty's dominions in which it shall be necessary to produce evidence of the existence of any power or jurisdiction Her Majesty may have in countries and places out of Her dominions, it shall be lawful for the judge or judges of such Court to put questions in writing respecting such power or jurisdiction to one of Her Majesty's secretaries of state, whose answer shall be final and conclusive. In the present instance there are ample materials on which to base a

(a) 7 Cranch, 116, 136.

vol. x. p. 577.

(b) Hertslett's Collection of Treaties,

(c) 20 & 21 Vict. c. 75.

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decision, and it is therefore not necessary to apply to the foreign secretary.

(2.) If the Supreme Consular Court had jurisdiction to entertain a suit at all between a British and a Russian subject, it could not exercise such jurisdiction in the way it has done in this case, viz., by a proceeding in rem. In the first place there is no provision in the Order in Council for proceedings *in rem*. Article 64 relates to suits *in personam* only, and all the necessary rules for arrest, bail, proceeding by default, &c., are nowhere to be found. That the Court was not a Court of Vice-Admiralty would seem clear when we consider the manner in which such Courts are created, namely, by letters-patent from the Crown and a commission from the Admiralty, with power to "take cognizance of all causes, civil and maritime," or if we consider their general method of procedure. For the history of the Admiralty jurisdiction we refer to the elaborate judgment of Mr. Justice Story in the case of *De Lovio v. Boit* (a). Moreover, in no one respect does the Supreme Consular Court appear to have complied with the prescriptions of the 2 & 3 Will. IV. c. 51—an Act to regulate the practice and the fees in the Vice-Admiralty Courts abroad, and to obviate doubts as to their jurisdiction. Sect. 1 of that Act provides for the making, by Order in Council, of rules and regulations for the exercise of the jurisdiction of such Courts; yet the Order in Council under which the Supreme Consular Court professes to act contains no such rules or regulations. Neither are there any copies of regulations and scale of fees hung up in the Supreme Consular Court, as sect. 4 requires in the case of Vice-Admiralty Courts. If the Supreme Consular Court were a Court of Vice-Admiralty it would have jurisdiction over a collision happening anywhere—in the North Sea, for instance—and this even twenty years after the occurrence. Had the legislature intended to confer any such extensive powers on Consular Courts it would have done so by express words, and would not have left them to be inferred. Indeed by a recent Order in Council—that of the 9th of January, 1863—the Supreme Consular Court is now expressly made a Court of Vice-Admiralty—a fact of itself sufficient to establish our position that at the time when this cause was instituted it had no such authority. So in the judgment appealed against the judge is forced to say: "The Court affirms its jurisdiction, not on the ground that it is a Court of Admiralty, or that it has jurisdiction in all cases taken cognizance of by Courts of Admiralty, but simply on the ground that it has jurisdiction in cases of collision within

(a) 2 Gallison, 398.

Turkish waters, and that it can exercise that jurisdiction in rem as well as in personam." He relies on "a customary jurisdiction" in support of that proposition. Of any such customary jurisdiction in rem there is no evidence. On the contrary, when we turn to the parliamentary returns of cases tried by the English consuls in the Ottoman dominions (*a*), we find indeed a few cases of suits on bottomry bonds; but it is clear that those were all actions against the captains of the vessels on their personal covenants; for in no case does the name of a ship appear as defendant. The masters' names are given and the suits are described as claims of debt on bottomry bond.

(3.) The Court below, finding both parties to blame, was not justified in dividing the damages. That rule is applied solely in the High Court of Admiralty and in British Vice-Admiralty Courts. It is not the law of England, nor is it, though often called so, the maritime law; it is not the law of the maritime states of Europe. The French code, which is the basis of the modern codes, divides damages in the case of pure accident or inscrutable accident, but apparently not otherwise. It enacts—Article 407—"En cas d'abordage, si l'événement a été purement fortuit, le dommage est supporté, sans répétition, par celui des navires, qui l'a éprouvé.

"Si l'abordage a été fait par la faute de l'un des capitaines, le dommage est payé par celui qui l'a causé.

"S'il y a doute dans les causes de l'abordage, le dommage est réparé à frais communs, et par égale portion, par les navires qui l'ont fait et souffert."

The Prussian Code, arts. 1911 to 1915 (*b*), agrees with the French Code; so likewise the Portuguese Code, arts. 1567—1570 (*c*); the Spanish Code (*d*) appears to be silent on the subject of collision, but the Dutch Code, arts. 534 to 540 (*e*), also agrees with the French Code; and Vander Keesel, in his Commentary on Grotius's Introduction to Dutch Jurisprudence (*f*), says, art. 816: "If the damage arising from the collision is attributable to the fault of both parties, then the loss is not in common, as formerly held by the Supreme Court; but each party bears his own loss. This is supported also by the laws of Rotterdam and Dordrecht." The Russian Code, Chapter V. "Of

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(*a*) Papers relative to the Jurisdiction of Her Majesty's Consuls in the Levant, presented to both Houses of Parliament by command of Her Majesty, 1845, pp. 79, *et seq.*

(*b*) Printed 2 Levi's Commercial

Law, 1st ed. p. 175.

(*c*) 2 Levi, 146.

(*d*) 2 Levi, 147.

(*e*) 2 Levi, 168.

(*f*) Translation by Lorenz (London, 1855), p. 273.

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Reciprocal Averages," arts. 833 to 847 (*a*), seems to enact that where both parties are to blame, each bears his own loss. Thus, art. 826 : " If the captains of two vessels navigating in opposite directions, from obstinacy will not yield place one to the other, and one of the two vessels runs foul of the other, and the shock occasions damage to one or both, the captain who has been obstinate bears the damage which he has sustained." The Hamburg Code (*b*) apparently does divide, unless one party is solely to blame ; but in this it stands alone amongst the codes. The Laws of Oleron, art. 14 (*c*), and the Laws of Wisbuy, arts. 50 & 70, are not very precise, except that in case of inevitable accident the damages are to be divided. The discussion in Emerigon (*d*) shows that the rule of dividing damages is resorted to as a *rusticum judicium*, and that only in cases where no one is to blame, or where the Court cannot say who was to blame for the accident ; it ought not to apply therefore in cases where the fault of both parties is clearly ascertained. Bynkershoek is still clearer on the point (*e*). Against the decision of his own Court he maintains that the plaintiff, being himself in fault, cannot recover—" *Quemadmodum enim aget, qui ipse in culpa est ?*" and he evidently thinks (*f*) that to divide the damages in any case is an irrational rule. Such also was the opinion of Lord Denman, who, in *De Vaux v. Salvador* (*g*), calls the rule of division " an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice nor possibly quite consistent with it." The result, therefore, would stand thus, that the rule of dividing damages when both parties are to blame is ill-founded in reason, finds no place in the modern European codes, and is in absolute conflict with the municipal law of England touching maritime collisions and every species of accident and negligence. The rule subsists in the Admiralty Court only and its dependents, the Vice-Admiralty Courts, of which the Supreme Consular Court of Constantinople was not one. Nor is there anything in the proceeding in *rem* which requires the application of such a rule ; either rule may be applied in either kind of action ; and in fact the Court of Admiralty does apply the rule of dividing the damages where the action, as sometimes is the case, is in *personam* only. Again, if the rule of reciprocity avails anything here, then the British and Russian

(*a*) 2 Levi, 159.

(*b*) 2 Levi, 174.

(*c*) Peter's Admiralty Reports, vol. i., Appendix.

(*d*) Vol. i. p. 408, chap. xii. s. 14.

(*e*) Quæst. Jur. Priv. Lib. iv. c. 22.

(*f*) Chap. xviii.

(*g*) 4 A. & E. 432.

municipal laws coincide that a plaintiff who is to blame cannot recover.

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C. P. Butt and *Pritchard* for the respondents.—Whatever may be the rights of the Queen as between herself and the Turkish government to exercise the jurisdiction for which the respondents contend, she could not of course do so except with the consent of the Russian authorities. Accordingly art. 64 of the Order in Council of the 27th of August, 1860, only gives power to Her Majesty's Supreme Consular Court to determine suits between British subjects and the subjects of a foreign state, provided the foreigner obtains and files in such Court the consent in writing of his consul to his submitting, and provided he does submit, to the jurisdiction of such Court, and provided he gives security, if required, to abide by and perform the decision of the Court. In the present case the Russian subjects have filed the requisite consent of their own Consul General at Constantinople, and have given the security required. The Russian Consul General gives such consent as the representative of his government, and therefore the argument of the appellants that the consent of a party to a suit cannot give compulsory jurisdiction to a Court of justice fails to meet the facts of the case. Here we have not only the consent of the Russian subjects parties to the suit, but also the consent of their government, that the English Court shall exercise jurisdiction over them. Then as to the argument that the Court has no means of enforcing its judgment against a Russian subject. The answer is, that before proceeding in the suit it takes care to have either a deposit or the guarantee of an English subject against whom it could proceed to execution. In the present case the Court holds the bond of the Ottoman Bank—an English Joint Stock Company—for the due performance of any judgment against the Russian Steam Navigation and Trading Company in these suits.

On the question whether or no Her Majesty has jurisdiction in Turkey in suits between British subjects and foreigners, the main argument of the appellants has been that without some treaty stipulation with the Sublime Porte by which such jurisdiction is expressly granted, Her Majesty could not assume to exercise it. So to do, it is said, would be to oust the territorial sovereign—the Sultan—of his rights, a violation of every principle of international law. To this the respondents reply—1st, That the Sultan has by treaty stipulation expressly foregone his rights as territorial sovereign in such cases. 2ndly, That independently of treaties and capitulations, Her Majesty might

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(1.) It is true that in the treaties between Great Britain and Turkey there are no words which say that Her Majesty may exercise jurisdiction in Turkey in cases between her own subjects and the subjects of foreign states, but we have the following state of things existing. It is expressly stipulated that in case of dispute between the English themselves, the decision shall be left to their own ambassador or consul. Similar privileges have been granted by the Sultans by treaty to every other European power. The first of those treaties was made with Venice in 1540. Thus the Porte has, during the last 300 years, shown a disposition to leave foreigners resident in Turkey to their own authorities. But it has gone further than this, for by treaties with certain powers the Sultan has ousted himself of his territorial jurisdiction in cases between the subjects of those powers and other foreigners. Thus by No. 52 of the capitulations with France, made at Constantinople in 1740, it is provided that—

“ S’il arrive que les consuls et les négociants aient quelques contestations avec les consuls et les négociants d’une autre nation chrétienne, il leur sera permis, du consentement, et à la réquisition des parties, de se pourvoir par-devant leurs ambassadeurs qui résident à ma Sublime Porte; et tant que le demandeur et le défendeur ne consentiront pas à porter ces sortes de procès devant les Pacha, Kadi, Officiers ou Douariers, ceux-ci ne pourront pas les y forcer, ni prétendre en prendre connaissance” (a).

So in the treaty of Constantinople with Russia, 1829, art. 7, “ Les sujets, bâtimens et marchandises Russes seront à l’abri de toute violence et de toute chicane: les premiers demeureront sous la jurisdiction et police exclusive du ministre et des consuls de Russie; les bâtimens Russes ne seront jamais soumis à aucune visite de bord quelconque de la part des autorités Ottomanes, ni en pleine mer, ni dans aucun des ports ou rades soumis à la domination de la Sublime Porte” (b). [Dr. LUSHINGTON. You must show that the Sultans have ceded these rights of jurisdiction to the Queen.] Our argument is that they have been ceded to certain other powers—Russia and France for instance—and that this being the case, the Queen is entitled to the same rights under the “most favoured nation clause” in her treaties with the Porte. It is then clear that by treaties with

(a) Printed, Miltitz, Manuel des Consuls, vol. iii. p. 127.

(b) Recueil—Manuel de Traités, par Martens et Curry, tome iv. 224.

France and Russia the Sultan has agreed to forego his rights as territorial sovereign in suits between the subjects of those states and other foreigners, i. e. he has, so far as he could do so, made over his jurisdiction in such cases to France and Russia. In the treaty of Balta Liman, quoted by the appellants, there is the following article:—

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Art. 1. “and it is moreover expressly stipulated that all rights, privileges or immunities, which the Sublime Porte now grants or may hereafter grant, to the ships and subjects of any other foreign power, or which it may suffer the ships and subjects of any other foreign power to enjoy, shall be equally granted to, and exercised and enjoyed by, the subjects and ships of Great Britain” (a). And this article re-appears in the treaty of commerce between Great Britain and Turkey entered into in 1861. The respondents therefore submit that so far as the Porte could confer it, the Queen has by treaty acquired jurisdiction in suits between one of her own subjects and a foreigner.

(2.) Her Majesty has acquired such jurisdiction by usage and sufferance. That she may acquire jurisdiction by those means in the dominions of some foreign States there can be no doubt. The Foreign Jurisdiction Act (6 & 7 Vict. c. 94) would of itself suffice to show this. Sect. 1 recites, “whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty’s dominions, &c.” But it is said no such rights as those claimed could be acquired in Turkey by sufferance, because they can only be so acquired in barbarous or semi-civilized States, whilst by the treaty of Paris of 1856 Turkey is admitted into the family of European nations. To this we reply that the rights in question, if acquired at all by usage and sufferance, were so acquired long before the treaty of 1856, and not being taken away by that treaty, continue to operate. Then again the appellants contend that jurisdiction can only be acquired by Her Majesty by usage and sufferance in countries with which she has none given her by treaty. They give no authority in support of this proposition, which would in effect put an end to nearly the whole of our administration of justice in the Levant: for a glance at the various Orders in Council under which the English Consular Courts have exercised their jurisdiction will show that usage and sufferance have been regarded by the English government as the foundation of much of Her Majesty’s power and authority in Turkey. To take one example. In the very Order in Council in question—

(a) Printed Hertslett’s Treaties, vol. v. p. 507.

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that of the 27th of August, 1860—Art. 28 provides that “the Supreme and every other Consular Court shall be a Court of Law and Equity, and (subject to the other provisions of the present order) shall have, and may exercise, all jurisdiction, power, and authority, legal, equitable, or other, which any consul of Her Majesty *by custom has* or may exercise in the dominions of the Sublime Ottoman Porte.”

The next question then is—Have Her Majesty's consuls in Turkey as a matter of fact long exercised jurisdiction over suits between British subjects and foreigners? The matter admits of no doubt. The appellants have quoted from a letter of the solicitors to the Levant Company, dated the 8th of June, 1812. That letter is commented upon in a Report written in 1833 by Colonel Campbell, His Majesty's Agent and Consul-General in Egypt. He says, “It appears, from a letter of the solicitors of the late Levant Company, of the 8th June, 1812, a copy of which is herewith enclosed, that ‘though the consul may use his influence with a British subject to induce him to do justice to a foreigner, yet he cannot decide between them, because his doing so presumes a power to decide against the foreigner, which he has no right to do; nor can it be material he should have any such right, as the authorities of the country are open to the foreigner, whose case will be decided upon in the proper Courts.’ Now it is incorrect to say that the authorities of the country are open to the foreigner, such not being the case; and there is not a single Turkish authority in Egypt, that would not answer, upon the complaint of one European against another, that he has no power over them, and that he must apply to his consul for redress. It is therefore material that a consul should have power to decide when the question is within the limits of his competence.” The report goes on to show how such jurisdiction between Europeans of different nationalities was in fact exercised by all the European consuls. It then continues in these words—“But the privileges acquired by Europeans in the Levant go still further, and, generally speaking, unless the case is a very serious one, the government itself sends its own subjects, who have to complain of foreigners, to their respective consuls for justice; and it is generally understood that every European in Egypt, except when guilty of a capital crime on the person or property of an Ottoman subject, or against the State, lives under the laws of his country, and the exclusive jurisdiction of the consul of his nation. Three years after that Report was written, the statute 6 & 7 Will. IV. c. 78, passed, and we find sect. 2, in perfect accord with Colonel Campbell's statement, providing for the exercise of jurisdiction by His Ma-

jesty's consuls in cases between British subjects and foreigners. The Act was passed in 1836, the year following the Report of the Select Committee on the Consular Establishment, and evidently in consequence of that Report. Can it be doubted that the legislature had then arrived at the conclusion that the jurisdiction which sect. 2 professes to regulate was then, and had been previously exercised by His Majesty's consuls in Turkey? On behalf of the appellants, an opinion of Sir John Dodson to the effect that His Majesty's consuls had not jurisdiction in cases between British subjects and foreigners has been cited. But that opinion was written before the passing of the 6 & 7 Will. IV. c. 78. If any weight is to be attached to that opinion, it will be found to be in favour of the respondents: for Sir John Dodson does not base his conclusion upon the assertion of any want of jurisdiction in His Majesty, but he points out that the Act by which the authority of the consuls of the Levant Company was transferred to His Majesty's consuls does not give them such jurisdiction, and he goes on to advise that an Act of Parliament should be passed for the purpose of removing the doubt—thus assuming that the right of the Crown to the jurisdiction in question existed, though it had not been conferred on the consuls. The Act was passed shortly afterwards; and from that time to its repeal by the Foreign Jurisdiction Act there is abundant evidence that the jurisdiction in question was constantly exercised by His Majesty's consuls. In the "Papers relative to the Jurisdiction of Her Majesty's Consuls in the Levant," presented to both Houses of Parliament in 1845, there are returns of civil suits tried in the Consular Courts in Turkey which include a great number of cases between British subjects and foreigners (a).

The 6 & 7 Will. IV. c. 78, was repealed in 1843 by the Foreign Jurisdiction Act (6 & 7 Vict. c. 94), intitled "An Act to remove Doubts as to the exercise of Power and Jurisdiction by Her Majesty within divers Countries and Places out of Her Majesty's Dominions, and to render the same more effectual." Sect. 1, after reciting that "whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions," goes on to provide that such power and jurisdiction may be exercised "in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the union or conquest of territory." Under the authority of that Act a series of Orders in Council have been made for the regu-

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(a) See pp. 79—105.

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lation of the exercise of Her Majesty's jurisdiction in the Ottoman dominions, all of which recite this Act, and in all of which Her Majesty's ambassadors and consular officers are expressly authorized to continue to exercise all such jurisdiction and power as have been *customarily* exercised by them and their predecessors in the Sultan's dominions. The Orders in Council of the 27th of August, 1857, of the 27th of August, 1860, and the still more recent one of the 9th of January, 1863, all contain express provision for the exercise by English consuls in Turkey of jurisdiction in suits between British subjects and foreigners—affording conclusive proof that, whether rightly or wrongly exercised at the outset, there has been in fact for a very long time past a continuous exercise of such jurisdiction. Nor have the English Consular Courts been singular in this. In Wheaton's *Elements of International Law* (a), the nature and extent of this jurisdiction is thus correctly described:—"On the general doctrine in force in the Levant, of the extraterritoriality of foreign Christians, has been founded a complete system of peculiar municipal and legal administration, consisting of:—1. Turkish tribunals for questions between subjects of the Porte and foreign Christians. 2. Consular Courts for the business of each nation of foreign Christians. 3. Trial of questions between foreign Christians of different nations in the Consular Court of the defendant's nation." The respondents therefore submit that it is clear that both by treaty, and by usage and sufferance, Her Majesty has jurisdiction over such a suit as the present in the Ottoman dominions.

It remains then to show that Her Majesty has, by Order in Council, conferred her jurisdiction in such cases on the Supreme Consular Court. The very positive language of the 64th article of the Order in Council of the 27th of August, 1860, can leave no doubt that Her Majesty has conferred on that Court her jurisdiction in ordinary suits, i. e., suits in personam between British subjects and foreigners; but the appellants say that the Order in Council does not warrant the exercise of such jurisdiction by a proceeding in rem. Now, once admit that Her Majesty has such jurisdiction, and art. 13 of the Order in Council would seem to confer it on the Supreme Consular Court, "all Her Majesty's jurisdiction, civil and criminal, exerciseable in the dominions of the Sublime Ottoman Porte shall, for and within the district of the Consulate-General of Constantinople, be vested exclusively in the Supreme Consular Court as its ordinary original jurisdiction." The appellants seek to limit the effect of

(a) 2nd annotated ed. by Lawrence, pp. 224, 225, note.

that article by saying, that, although it *vests* all Her Majesty's jurisdiction in the Supreme Consular Court, yet art. 4 prescribes the manner in which such jurisdiction is to be *exercised*, viz., "under and according to the provisions of this Order, *and not otherwise.*" They then insist that inasmuch as neither an Admiralty procedure nor any procedure in rem is expressly given by the Order, it cannot be resorted to. To give effect to that argument it would be necessary to strike out art. 5 altogether; for that article authorizes the exercise by the Consular Court of Her Majesty's jurisdiction "upon the principles of and in conformity with the common law, the rules of equity, the statute law, *and other laws*, for the time being in force in England, and with all powers vested in and pursuant to the *course of procedure and practice* observed by and before Courts of justice and justices of the peace in England according to their respective jurisdiction and authorities."

If it were necessary for the respondents to contend for a Vice-Admiralty jurisdiction, as such, instead of a mere customary jurisdiction in rem, the words "other law" and the words "course of procedure and practice observed by and before Courts of justice in England," would seem to warrant the application of maritime law and the practice and procedure of the Court of Admiralty. But it is not necessary to go, and the Court below has not gone, this length. If the respondents can show that a jurisdiction in rem has been customarily exercised by Her Majesty's consuls, that will suffice; for art. 26 provides, that "the Supreme and every other Consular Court shall be a Court of law and of equity, and (subject to the other provisions of the present Order) shall have and may exercise all jurisdiction, power, and authority, legal, equitable or other, which any consul of Her Majesty by custom has or may exercise in the dominions of the Sublime Ottoman Porte." Now, in the first place, in his judgment Sir Edmond Hornby expressly states that "there is no doubt that consuls in the Levant have customarily exercised, and still continue to exercise, jurisdiction over ships in the sense of ordering their detention and sale. In actions on bottomry bonds vessels are constantly stopped, sequestered, and sold." The Supreme Consular Court at Constantinople, being a Court of Appeal from all the outlying Consular Courts in the Ottoman dominions, those facts must be within the judicial cognizance of Sir Edmond Hornby, whose statement, the respondents submit, must therefore be taken as conclusive. And if there be a customary jurisdiction in rem in cases of bottomry, why not in cases of collision? In either action the procedure is based on the same incident—a maritime lien—and the reasons derived from

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expediency, urged in the judgment of the Court below, are no less cogent in the one case than in the other.

The only remaining question upon this part of the case is, whether the Supreme Consular Court, having a jurisdiction in rem, had also the right to follow the rule of the Court of Admiralty by dividing the damages where both vessels were to blame. In order to determine this question it is not necessary to inquire what the municipal law of Great Britain or the municipal law of Russia may be. The Supreme Consular Court is a Court established abroad in neither the one nor the other of those countries. It, in common with the Consular Courts of other nations at Constantinople, has to administer justice between persons of every nationality, and much of its efficiency depends upon the system of reciprocity prevailing amongst the representatives there of all the States of Europe. It is obviously desirable that a Court so situate should, so far as may be, administer justice in conformity with the law prevalent amongst European nations, rather than according to the last municipal law of Great Britain. That the course pursued by the learned judge of the Court below is in accordance with the law of most nations, the following passage from Kent's Commentaries (*a*) may serve to show:—"The greatest difficulty on the subject has arisen in the cases in which the collision proceeded evidently from error, neglect, or want of sufficient precaution, but the neglect or fault was either inscrutable, or equally imputable to both parties. In this case of blame existing which is undiscoverable, the marine law, by a rusticum judicium, apportions the loss as having arisen equally by the fault of both parties. The rule is universally declared by all the foreign ordinances and jurists; and its equity and expediency apply equally where both parties are to blame and where the fault cannot be detected." The judgment of the House of Lords in the case of *Flay v. De Neve* (*b*) is a further authority in support of the rule for which the respondents contend.

Brett, Q.C., replied.

DR. LUSHINGTON (after consultation).—Their Lordships are of opinion that the Supreme Consular Court had jurisdiction to entertain this suit in rem. They reserve their reasons, and also the question whether the Court below was right in applying the Admiralty rule as to the division of the damages.

The same counsel were then heard on the merits.

(*a*) 10th ed. vol. iii. p. 323.

(*b*) 2 Shaw's Scotch App. Cases, 395.

On the 5th of August DR. LUSHINGTON delivered the judgment of their Lordships :—

In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations. This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt that as a matter of right no State can claim jurisdiction of any kind within the territorial limits of another independent State. It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on treaty or engagements of similar validity. Such, indeed, were factory establishments for the benefit of trade. But though according to the laws and usages of European nations a cession of jurisdiction to the subjects of one State within the territory of another would require, generally at least, the sanction of a treaty, it may by no means follow that the same strict forms, the same precision of treaty obligation, would be required or found in intercourse with the Ottoman Porte.

It is true, as we have said, that if you inquire as to the existence of any particular privileges conceded to one State in the dominions of another, you would amongst European nations look to the subsisting treaties, but this mode of incurring obligations or of investigating what has been conceded is matter of custom and not of natural justice. Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a treaty is the best proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States. Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence where there must be full knowledge.

We, having considered the materials before us, entertain no doubt that, so far as relates to the Ottoman Government, no objection is tenable against the exercise of jurisdiction between British and Russian subjects. Indeed the objection, if any such could properly be urged, should come from the Ottoman Government rather than a British suitor, who, in this case, is

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A wide difference in the dealings between an Oriental and a Christian State, and the intercourse between two Christian nations.

As between two Christian States all claims for a cession of jurisdiction or exemption from jurisdiction within the territory of the other require, generally at least, the sanction of a treaty;

but consent may be expressed by usage and conscious acquiescence, especially in transactions with Oriental States.

The Ottoman Government has long acquiesced in allowing to the British Consular authorities in Turkey a jurisdiction be-

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tween British
subjects, and
the subjects of
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bound by the law established by his own country. The case may, in some degree, be assimilated to the violation of neutral territory by a belligerent; the neutral State alone can complain. We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States. It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts; then in the progress of time commerce increasing, and various nations having the same interest in abstaining from resort to the tribunals of Mussulmans, &c., recourse was had to Consular Courts, and by degrees the system became general. Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent. The principles are fully explained in the celebrated judgment of Lord Stowell in the case of the *Indian Chief* (a).

Such acquiescence of the Ottoman Government does not vest a compulsory power in an English Court in Turkey over the subjects of other foreign States; but the foreigner may voluntarily submit to its jurisdiction with the consent of his Sovereign.

Though the Ottoman Porte could give and has given to the Christian powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to one such power any jurisdiction over the subjects of another power. But it has left those powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose tribunals they resort. There is no compulsory power in an English Court in Turkey over any but English subjects; but a Russian or any other foreigner may, if he pleases, voluntarily resort to it with the consent of his Sovereign, and thereby submit himself to its jurisdiction.

The effect of the 6 & 7 Vict. c. 94, is to make the jurisdiction of the British Consul in the Ottoman Empire liable to be regulated by Order in Council.

This case is provided for by the 6 & 7 Vict. c. 94.

The first section of that Act recites that, "by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction, within divers countries and places out of Her Majesty's dominions; and that doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent upon the laws of this realm;" and enacts that "Her Majesty may exercise any power or jurisdiction which Her Majesty now hath, or may at any time hereafter have, within any country out of Her Majesty's domi-

(a) 3 C. Robinson, 26.

nions, in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the cession or conquest of territory." The effect of this section is that the jurisdiction of the British Consul in the Ottoman Empire became, within the limits within which it existed by usage or sufferance, liable to be regulated by Order in Council.

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Now the Order in Council dated the 27th August, 1860, recites among other matters that :—

"Her Majesty has had and now has power and jurisdiction in the Ottoman dominions, and that it is expedient to *revise and consolidate* the provisions of the former Orders, and to make further provision for the due exercise of Her Majesty's power and jurisdiction aforesaid, and for the more regular and efficient administration of justice and the better maintenance of order among all classes of Her Majesty's subjects and of persons enjoying Her Majesty's protection resident in or resorting to the dominions of the Sublime Ottoman Porte."

The Order in Council, 27th August, 1860, provides for the exercise by the British Consular Judge in Turkey of jurisdiction in suits between British subjects and the subjects of other States ;

The 64th section of the Order provides that—

"64. The Supreme or other Consular Court, according to its respective jurisdiction, original or appellate (as the case may require), and in conformity with the rules relating to suits between British subjects and appeals therein, may hear and determine any suit, proceeding or question of a civil nature instituted, taken or raised by a British subject against a subject of the Sublime Ottoman Porte, or a subject or citizen of any other State in amity with Her Majesty, or by a subject of the Sublime Ottoman Porte, or a subject or citizen of any other State in amity with Her Majesty against a British subject :

" Provided that the subject of the Sublime Ottoman Porte, or the subject or citizen of such other State as aforesaid, obtains and files in such Court the consent in writing of the competent local authority on behalf of the Sublime Ottoman Porte or of the Consul of such other State (as the case may be) to his submitting, and does submit, to the jurisdiction of the Supreme or other Consular Court, and, if required, gives security to the satisfaction of the Court, by deposit or otherwise, to pay fees, damages costs, and expenses, and abide by and perform any such decision as may be given by the Supreme or other Consular Court originally or on appeal (as the case may require)."

The plaintiff in this case has complied with these conditions, and has thereby submitted himself in this suit to the jurisdiction of this Court. The Court has no jurisdiction over him except by his consent. It could not have entertained the cross action unless by his submission to its authority, and it has compelled him to give that consent by refusing to proceed in the action which he has

and in the present case the Russian plaintiff has voluntarily submitted.

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instituted against the original defendants unless he consented to do justice by appearing to the cross action which they desired to institute against him. He has thought fit to comply with these terms, and he does not now complain of them, and it would be singular if the party who himself is by law subject to this tribunal could raise an objection that the Court had no right to exercise the jurisdiction which at his instance it has enforced against his adversary.

The general right of the Court to entertain the suit under these circumstances is perfectly clear, and to throw any doubt upon it would be to subvert all the principles upon which justice is administered amongst the subjects of Christian powers in this and other countries of the East.

The nature and extent of the jurisdiction must be solved by reference to usage. The Consular Court has exercised a customary jurisdiction *in rem* in cases of bottomry; whence the right to exercise a similar jurisdiction in cases of collision may be inferred.

Hitherto we have spoken of jurisdiction in its general sense, and have stated our conclusion that for a case of collision in the Sea of Marmora some legal proceeding would belong to the Consular Court. Now we must inquire further whether it was competent to the Court to proceed as if it were invested with the authority of a Vice-Admiralty Court. We think that question must be solved by reference to the usage which has prevailed; the usage respecting the arrest of vessels, the proceeding *in rem*.

So far as we can ascertain from the information furnished to us, there appears to have been one case of collision—possibly more, but there is proof of one only. The Consular Judge, however, states that proceedings *in rem* have been customary, and especially in cases of bottomry. Now causes of bottomry where the ship is arrested, are clearly proceedings *in rem*, usually of Admiralty jurisdiction. We think that by the very extensive and comprehensive terms used, such a jurisdiction has been conferred upon the Consular Court, and if in bottomry we can discover no reason why it should not exist in causes of collision; the same considerations of convenience, the same necessity for obtaining justice, subsist in both cases. It is not necessary to declare that the Court possessed full Admiralty jurisdiction; it is sufficient to express our concurrence with the Consular Judge that with respect to proceedings *in rem*, the causes of action occurring within given limits, and the usage of so treating cognate causes, such as bottomry cases, justify him in the course he has pursued on the present occasion, and therefore we must uphold the jurisdiction.

The jurisdiction being *in rem*, the rules applying to actions *in rem* apply, rather than the

There is, however, another question which required our serious attention. There was a cross action in addition to the original action. The Judge found both parties to blame, and he ordered that the damage sustained by each should be added together,

and each party pay one-half. The effect on the present occasion would be a loss to the *Laconia* of about 20,000*l.*; but it is not to the effect we must look; we must direct our attention to other considerations. Had the rule prevailing at common law been adopted, each party would have had to bear his own loss. Opinions may differ, and indeed do differ, as to what course is most consonant to justice. This question we are not called upon to decide; but what we have to decide is, when the proceeding is *in rem*, what ought to be the rule? What was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction *in rem*? Could it be intended to constitute a jurisdiction *in rem* with a common law remedy? We think that no such anomaly could be intended, and therefore concur in the view of the Consular Court.

We regard the recent Order in Council, by which a certain Admiralty jurisdiction is expressly given, not as creating such jurisdiction, but only as expressing more distinctly and with greater detail the authority which had been already conferred by former Orders.

It now becomes our duty to state the determination at which we have arrived upon the merits of the case. After the most careful and anxious consideration of every part of the evidence and of every point in the argument, we concur in the intimation given by the learned Judge of the Court below, that "under the circumstances it would seem a simple, and perhaps it would be the right course, to say neither party has proved his case." That is the decision which we have adopted, and we shall therefore humbly recommend to Her Majesty that the judgment of the Supreme Consular Court on the merits be reversed, and that both actions be dismissed, each party paying their own costs throughout, and that the monies deposited be given up and the securities vacated.

Pritchard & Sons, proctors for the appellants.

Walker & Twyford, solicitors for the respondents.

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rules of the English common law in personal actions; and therefore if both parties are found to blame for the collision, the damages ought to be divided.

The Order in Council, 9th January, 1863, confirms rather than confers the Admiralty jurisdiction of the Consular Court.

Neither party has, however, proved his case; both actions therefore to be dismissed.

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June 9, 16.

IN the Matter of THE BOUNTIES PAYABLE IN RESPECT OF THE SEIZURE OF CERTAIN SLAVES AT SIERRA LEONE.

Slave-trade—Bounties—5 Geo. IV. c. 113, ss. 26, 28, 38—11 Geo. IV. & 1 Will. IV. c. 55, s. 1.

The governor of a colony being the person to whom the general management of such colony is entrusted is the person entitled to the bounties payable in respect of a seizure of slaves, even though he is absent from the colony at the time the seizure is made.

THIS was a question brought before the Court of Admiralty under the jurisdiction conferred by the 5 Geo. IV. c. 113, s. 28, to determine whether the bounties payable in respect of the seizure of certain slaves and canoes at Sierra Leone, were payable to Colonel Hill, the captain-general and governor in chief of the colony, or to Mr. Fitzjames, the acting governor at the time the seizure was made.

The 26th section of the 5 Geo. IV. c. 113, enacts, “where such seizure (of slaves) shall not have been made at sea by the commander or officer of any of his Majesty’s ships or vessels of war, there shall be paid to and to the use of the person who shall have sued, informed and prosecuted the same to condemnation, the sum of seven pounds ten shillings for every man, woman and child that shall be so condemned and delivered over, and also the like sums to and to the use of the governor or commander-in-chief of any colony or plantation wherein such seizure shall be made.”

The first section of the 11 Geo. IV. & 1 Will. IV. enacts, “in lieu of the former bounties, there shall be paid out of the consolidated fund of the United Kingdom of Great Britain and Ireland, to the seizor, or to the seizor and governor respectively, in those cases where the governor of any of his Majesty’s colonies or plantations is or may be entitled, a bounty of five pounds each of lawful money of Great Britain, upon every man, woman and child slave seized and condemned as forfeited and delivered over agreeably to the several provisions of the above recited Acts.”

The Queen’s Advocate and *E. C. Clarkson* appeared for Colonel Hill.

Dr. Deane, Q.C., and *Mellish*, Q.C., for Mr. Fitzjames.

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DR. LUSHINGTON.—The question for the decision of the Court in this case is, who is entitled by law to the bounties payable on the seizure of certain slaves at Sierra Leone—the governor, who was absent at the time of the seizure, or the acting governor in the colony? The decision of this question entirely depends upon the construction to be given to certain Acts of Parliament. The charter has no substantive operation or effect, though possibly it may, in case of doubt, throw some light upon the meaning of the words to be found in the statutes. The question is brought before the Court at the instance of Mr. Fitzjames, the acting governor of the colony; and for the purpose of considering the main point in dispute, I assume as proved that all the slaves were seized when the governor himself was absent from the colony. I do not think it necessary, for the purpose of deciding the principal question in this case, to advert to particular parts of the pleadings, namely, whether some of the slaves were seized before the governor, Colonel Hill, had actually left the colony or not; nor whether on former occasions the acting governor had received bounties. If I should be of opinion that all bounties for the seizure of slaves during the absence of the governor were payable to the acting governor, then as to a part of the slaves, the question, whether the governor had actually quitted the colony at the time of the seizure of some of the slaves, might be so far of importance; but if I should be of a contrary opinion, that disputed fact would be irrelevant. Nor do I think that the fact, assuming it to be proved, that on some occasions the acting governor has received the bounties, can affect the main question, viz., the construction of a modern Act of Parliament. I must observe that I am somewhat surprised that in these pleadings no reference is made on either side to the statutes; upon the interpretation of which, if I am not wholly mistaken, the whole question depends. The whole subject of the bounties is a creation of the legislature, and the sole inquiry is, to whom the Act or Acts of Parliament have directed the bounties to be paid. The Acts in question are the 5 Geo. IV. c. 113, s. 26; and the 11 Geo. IV. & 1 Will. IV. c. 55. These statutes are *in pari materiâ*, and must be read together. The 26th section of the 5th Geo. IV. directs, that in the case of the seizure on land, there shall be paid to the governor or commander in chief the sum of 7*l.* 10*s.* for each slave. The 11 Geo. IV. & 1 Will. IV. c. 55, enacts that the different rates heretofore payable on each slave shall be repealed, and in lieu of the former bounties there shall be paid to the seizer or governor respectively, in those cases where any governor is entitled, a bounty of 5*l.* Then as to the construction of these two

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enactments. I will first consider each statute separately, always remembering that if the words bear a plain meaning, that meaning must not be altered by ingenious reasoning as to what is fit or right to be done. It has been urged that in the seizure of slaves, the intention of the legislature must have been to reward the person by whose immediate agency the capture was effected, to stimulate to some further exertion. That argument is, I think, to a certain extent, well founded; but it does not apply so directly to the case of a governor or acting governor as it does to the case of an actual seizer. The proper part of a governor is general management—the institution of a good system, whereby not one particular capture may be made, but the trade effectually suppressed. It is obvious that such duty and conduct of a governor is not confined to a single act. The bounty to him is for a general performance of duty. Moreover it may be that, as the capture of slaves is accidental as to time, the seizure might be effected during a short absence, and in consequence of the governor's previous measures. Admitting, however, that the principle of reward to him through whom the capture is effected, is greatly entitled to weight, it can only be applicable in cases where the language of the statute raises a fair doubt. I have been referred to the 38th section, which enables an acting governor to do all the acts a governor might do; but I cannot say that this section helps me to a correct interpretation of the statute. It would be a very strained construction of this section to say that a power to do acts meant a power to receive bounties. I have looked to the 43rd and 44th sections, which were cited, but they leave the question where it was. I return then to the 26th section, and I am of opinion that there being a governor, I cannot enter into any speculation as to the meaning of the words "commander in chief." I think that the governor takes as *persona designata*, and that Colonel Hill, as such governor, is entitled to these bounties. I might add, that the conclusion I have come to is strengthened by the fact, that in the statute 11 Geo. IV. & 1 Will. IV. the word used is, payment to the governor.

Rothery, proctor for Colonel Hill.

Jennings, proctor for Mr. Fitzjames.



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In the Privy Council.

Present—LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THE AMALIA.

Collision between British and Foreign Vessel—Limitation of Liability—25 & 26 Vict. c. 63, s. 54.

In a cause of collision beyond British jurisdiction, between an English and a Belgian vessel :

Held, that the 54th section of the Merchant Shipping Acts Amendment Act, 25 & 26 Vict. c. 63, with respect to limited liability applies equally to British and foreign vessels. That it is not necessary that the owners of a vessel and cargo, before claiming limited liability, should acknowledge that their vessel was to blame.

COLLISION. This was a cause of damage instituted by the owners of the Belgian steamship Marie de Brabant against the British steamship Amalia in respect of a collision which happened in the Mediterranean Sea on the 15th of May, 1863, whereby the Belgian vessel was lost. On the arrival of the Amalia in Liverpool, three actions were instituted in the Admiralty Court against that ship and her freight by the owners of the Marie de Brabant, and the owners of the cargo which had been laden on board her, to recover damages in respect of the collision. The owners of the Amalia thereupon filed a petition claiming in respect of such collision a declaration that they were entitled to a limitation of their liability under the 54th section of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63).

The admission of this petition was demurred to on the part of the owners of the Belgian ship and cargo, and on the 4th of July, 1863, the Judge of the Admiralty Court gave the following judgment, overruling the demurrer, and admitting the petition.

DR. LUSHINGTON.—Technically speaking, this is simply a question whether the petition which was filed on the 18th June, 1863, on behalf of the owners of the Amalia shall be admitted or not. I will begin by stating that it is not my intention on

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the present occasion to enter into an examination of *Cope v. Doherty* (a) and the other cases, and for this obvious reason that they have been discussed over and over again, and are perfectly familiar, not only to the gentlemen I am now addressing, but familiar to all. A short statement will be sufficient to show the main question which it will be the duty of the Court to decide, and for the present I confine myself strictly to the main question only. A collision took place on the 15th of May last in the Mediterranean Sea between the British ship *Amalia* and a Belgian ship called the *Marie de Brabant*. Several actions were entered against the *Amalia* by the owners of the Belgian ship, and by the owners of cargo laden on board the Belgian ship.

The owners of the *Amalia* seek to have the benefit of limited liability under the Merchant Shipping Act Amendment Act of 1862, section 54, this Court by the 13th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), being authorized to exercise the same jurisdiction as the Court of Chancery in these matters. The question therefore is, whether by the Merchant Shipping Act Amendment Act of 1862 the British owners of the *Amalia* are entitled to the benefit of limited liability; or in other words, whether, when a collision takes place on the high seas between a British and a foreign ship, the British ship is by the statute entitled to limited liability. The question depends upon the construction of the statute and upon nothing else. Limited liability was no part of the law of England until it was established by statute. Lord Tenterden in the fourth part of his work, chap. 7, gives the history of limited liability. He states that by the common law limited liability did not exist; that the first statute creating it was the 7 Geo. II. c. 15, and he refers to the subsequent statutes and gives some account of the creation of limited liability in foreign states. I must say that this learning has but a remote bearing upon the question before me; it only shows that to a certain extent the law of England has adopted the principle of limited liability, but under what circumstances, and to what extent, must depend upon the interpretation to be given to the statute under consideration. The principle of limited liability is, that full indemnity, the natural rights of justice, shall be abridged for political reasons. The cases under the law prior to 1862 are valuable as illustrations but they are not precedents. Before however I come to consider the words of the Act, let me notice the objection which, *primâ facie*, may be urged against a construction giving limited

(a) 4 Kay & J. 367.

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liability to a British ship which has been in collision with a foreign ship on the high seas. The objection is this, that to exempt a British ship in such circumstances from full liability, the Act of Parliament is legislating against the foreigner with respect to an act done on the high seas out of British jurisdiction; and in support of this objection are properly cited the decisions in which a British ship, coming into collision with a foreign ship, has been exempted from the consequences of not having complied with the Merchant Shipping Act, with regard to certain sailing directions. It may be urged that such decisions may be justified, in some measure at least, on the ground that such a legislative enactment cannot attach upon the foreigner; and, therefore, that in a mixed transaction out of British jurisdiction, where a foreigner is concerned on one side, such an enactment has no operation at all. I am alluding now to the case of *The Saxonia* (a), which is familiar to all of us. The law was in that case laid down in the most explicit terms by the judicial committee, that although the regulations which were imposed by the statute or in virtue of the statute, purported to apply under all circumstances, they were not binding in the Solent, in the case of a British ship there meeting and coming into collision with a foreign ship—not binding upon either party. Now I have always recognised the full force of this objection, that the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction, and I especially did so in the case of the *Zollverein* (b). No statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction unless the words of the statute are perfectly clear; but I never said that if it pleased the British Parliament to make such laws as to foreigners out of the jurisdiction, Courts of Justice must not execute them; indeed, I said the direct contrary speaking of the Court of Admiralty, reserving any particular consideration that might attach to the Prize Court. Now, fully recognizing the force of this *primâ facie* objection, I do not think it is removed by the ingenious suggestion that this limited liability is a part of the *lex fori*. But however this may be, if the statute in question gives the right of limited liability to the British shipowner, and the foreign shipowner alike; if there be perfect reciprocity, then complete justice is done, and the former objection, that it was unjust to give relief to the British owner when a similar relief was denied to the foreigner, is removed, and I have no longer to struggle against an interpretation producing injustice. In construing this section, there-

(a) Lushington, 410.

(b) Swabey, 96.

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fore, I must look to see whether it purports to affect the owners of British ships and the owners of foreign ships; and if I find from the words of the section and from the whole context and subject-matter that it was the intention of the statute to make limited liability for both British and foreign ships, then I consider there is no serious objection to the British Parliament legislating for foreigners. First, from the words of the 54th section, it is, I think, beyond all question clear that this section must include for certain purposes both British and foreign ships. It is but to read it to come to that conclusion. "The owners of any ship, whether British or foreign, shall not," &c. According to the most ordinary and universally acknowledged rules of construction, which I believe ought never to be departed from where it is possible to admit them, these words require that for some purposes foreign ships must be held to be excluded. The question is for what purposes? It is contended and with truth that this 54th section is a component part of Part IX. of the Merchant Shipping Act of 1854, and reliance is then placed upon the 502nd section of that Act, which stands first in Part IX., and is there termed the "Application." Part IX. begins thus:—"Liability of Shipowners"—Application, 502. The ninth part of this Act shall apply to the whole of her Majesty's dominions. It is argued that these words which I have read exclude everything that might occur upon the high seas out of her Majesty's dominions, and consequently that they govern and restrict all that follows, and amongst other sections the 54th section of the Act of 1862. Now in the first place these words are affirmative, and I am happy to think that in *Cope v. Doherty (a)*, Lord Justice Turner took the same view of these words as I am disposed to take myself. Lord Justice Turner there said of the 502nd section, "It provides that this part of the Act shall apply to the whole of her Majesty's dominions, which I take to mean no more than that it is to be in force throughout those dominions." It may be very true that the assertion of an affirmative proposition may in very many cases be held to exclude whatever goes beyond it, upon the old principle, *expressio unius est exclusio alterius*. But this is not always a necessary consequence. I think a consideration of the whole of the Merchant Shipping Act will tend, in the present case, to a contrary inference, and will show that these words were intended to be no more than demonstrative to a certain extent, without being exclusive of anything. It is peculiar to this Act that it is not only divided into parts, but that to many of them

(a) 2 De G. & Jones, 623.

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there is a leading section termed the application. I do not mean to go into many of these. But to take one. The second part of this Act has exactly the same application in the same words as "Part IX. The ninth part of this Act shall apply to the whole of her Majesty's dominions;" and the manifest object of it is, that it shall be enforced in all British dominions. Moreover, before I can come to the conclusion that the effect of this heading will be to exclude everything that occurs upon the high seas out of British dominions, I must consider the whole tenor of the Act and the consequence of such a conclusion. Now the consequence of such a conclusion would be that the enactments would have no operation even as to British ships in the immense majority of cases. The collisions that occur within British dominions, that is to say, within British waters, and within three miles of the shore, form a minute proportion of the collisions which occur at sea. It has been held under the Merchant Shipping Act of 1854, that in cases where both were British vessels, though the collision took place on the high seas, the Merchant Shipping Act did extend to British vessels on the high seas. Now that decision necessarily negatives the argument that the Act is confined to British dominions. When I look at the extent of the evil to be remedied, and how entirely that remedy would be taken away in the great majority of cases were I to adopt this limitation in interpreting this 54th section, I feel satisfied that the truer and safer construction is, that it has operation on the high seas, and applies to both British and foreign vessels. To that conclusion I have come. It is expedient that I should now pronounce my opinion upon another point, viz. whether it is indispensably necessary that before the owner of a ship can obtain limited liability he should admit that he is to blame for the collision which has occurred. It is quite true that in the case of *Hill v. Audus (a)*, Vice-Chancellor Wood decided, that an owner resorting to the Court of Chancery for a declaration of limited liability must in his petition admit his liability. It is not for me to question the soundness of that judgment; the circumstances under which I am called upon to apply the statute are very different. This Court is at this present moment detaining a very valuable ship at a great loss to her owners; and if the Court can release this vessel from arrest, and at the same time secure the claimants the utmost amount that, if successful, they could receive under the 54th section of the Act of 1862, surely it is the duty of the Court so to do, because it would thereby prevent a serious injury to the owners

The 54th sect.
of the 25 & 26
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both British
and foreign
vessels.

(a) 1 Kay & John. 263.

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of the ship proceeded against without injury to the parties proceeding. I say a serious injury, because the ship might be detained during a very long litigation, even up to the final decision of the judicial committee, for no purpose whatever. If the actions failed, the only result could be that the plaintiffs would pay the costs; but the damage and loss occasioned by the delay would not be recoverable. The object of giving bail, it is clear, is to get the ship released, but if the ship could be arrested again the next day, which has occurred in some of these cases, no prudent owner would think of bailing his ship. I have, therefore, come to the conclusion that it is not indispensably requisite in these cases that the owner of a ship, be he British or foreign, preferring a claim in this Court under this statute to limited liability, should begin by acknowledging that his vessel is to blame. Now with respect to the mode of carrying into execution the 54th section of the Act of 1862, I do not think at present it is necessary to say anything. That may require some consideration. All that I shall do on the present occasion is to declare that the enactment does apply equally to British and foreign vessels, and I think that it is in my power, without running into direct opposition to Vice-Chancellor Wood, to pursue another course than that which he has done in cases when the ship was not at the time under arrest.

From this decree, the owners of the *Marie de Brabant* and of the cargo obtained leave to appeal under the 32nd section of the Admiralty Court Act, 1861.

The Queen's Advocate, The Admiralty Advocate, W. M. James, Q.C., and E. C. Clarkson, for the owners of part of the cargo of the *Marie de Brabant*.

Dr. Deane, Q.C., and E. C. Clarkson, for the owners of the *Marie de Brabant* and the other part of the cargo.

Brett, Q.C., Milward and Vernon Lushington, for the *Amalia*.

The questions for argument were, first, whether the collision having occurred on the high seas and not within her Majesty's dominions, between a British and a foreign ship, the owners of the *Amalia* were entitled, in respect to the collision, to a declaration of the limitation of their liability under the 54th section of the 25 & 26 Vict. c. 63; and, secondly, if the case was within the provisions of that section, whether the owners of the *Amalia* were entitled to the benefit of that Act unless they first admitted their liability in respect of the collision.

The following cases were cited:—*Nostra Signora de los Do-*

lores (a); *The Le Louis* (b); *The Johann Friedrich* (c); *The Saxonia* (d); *Zollverein* (e); *Johannes* (f); *Cope v. Doherty* (g); *The General Iron Screw Collier Company v. Schurmanns* (h); *The Wild Ranger* (i); *Hill v. Audus* (k). Statutes 17 & 18 Vict. c. 104, s. 504; 24 Vict. c. 10, s. 13; and 25 & 26 Vict. c. 63, ss. 38, 54, 57, 58 and 514.

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Their Lordships' judgment was now delivered by LORD JUDGMENT.
CHELMSFORD:—

This appeal from an order or decree of the learned Judge of the High Court of Admiralty involves a question of very great importance and of some difficulty. The case arose under the following circumstances:—On the 15th May, 1863, the Belgian steam-ship *Marie de Brabant* and her cargo were sunk and lost, and some persons on board of her were drowned by a collision with the British steam-ship *Amalia*, which took place in the Mediterranean Sea out of British territorial jurisdiction. The owners, master and crew of the *Marie de Brabant*, and the owners of the cargo, and the persons drowned, were all subjects of the kingdom of Belgium. On the 29th May, 1863, a suit was instituted in the High Court of Admiralty by the owners of the ship *Marie de Brabant* and her freight against the *Amalia* and her freight to recover damages to the amount of 40,000*l.* for the loss occasioned by the collision. And on the 1st of June, 1863, a similar suit was instituted by the owners of portions of the cargo of the *Marie de Brabant* to recover damages to the amount of 20,000*l.* The owners of the *Amalia* thereupon instituted a suit in the High Court of Admiralty for the purpose of obtaining a declaration that they were entitled to a limitation of their liability under "The Merchant Shipping Amendment Act, 1862," and presented a petition praying the Judge to declare that their aggregate liability (if any) to damages (excluding damages for the loss of life) should not exceed the sum of 8*l.* per ton of the *Amalia's* gross tonnage, which would amount to 14,600*l.* The owners of the *Marie de Brabant* opposed the admission of the petition on the grounds, first, that the owners of the *Amalia* were not entitled to any limitation of their liability; and, secondly, that if they were, they could not claim it without first admitting their liability to answer for the collision. The learned

(a) 1 Dod. 298.

(b) 2 Dod. 252.

(c) 1 W. Rob. 36.

(d) Lushington, 410.

(e) Swabey, 96.

(f) Lushington, 187.

(g) 4 Kay & John. 367; S. C. 2 De G. & Jones, 614.

(h) 1 John. & H. 180.

(i) Lushington, 553.

(k) 1 Kay & John. 263.

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Judge decided that it was not requisite for the owners of the *Amalia*, preferring their claim in the Court of Admiralty to limited liability, to begin by acknowledging that their vessel was to blame, and that they were entitled to the limitation of liability which they claimed as against the owners of the *Marie de Brabant* and her cargo under the 54th section of "The Merchant Shipping Act Amendment Act, 1862." Upon the hearing before their Lordships the Queen's Advocate stated that he would not insist upon his objection that the owners of the *Amalia* were bound to admit their liability before their petition could be received, and confined himself to the question whether the 54th section of the Act applied to the case of a collision between a British and a foreign ship occurring beyond the limits of British jurisdiction in a suit instituted by the foreign owners against the British ship. For the proper determination of this question it will be necessary to refer to corresponding provisions of the Merchant Shipping Act, and also to examine the previous decisions upon the subject. The 504th section of "The Merchant Shipping Act, 1854," which corresponds to the 54th section of "The Merchant Shipping Act Amendment Act, 1862," limits the liability of the owner of any sea-going ship, occasioning loss or damage without his fault or privity, to the value of the ship and freight. This section clearly applies solely to British ships. The decisions upon the former Act, which it may be necessary to notice, are *Cope v. Doherty*, *General Iron Screw Company v. Schurmanns* and the case of the *Wild Ranger*. *Cope v. Doherty* was a case of collision between two American ships on the high seas, where it was properly held that there could be no limitation of liability under the 504th section of "The Merchant Shipping Act, 1854." It seems extraordinary that any question should ever have been raised upon a case of this description. The next case of the *General Iron Screw Collier Company v. Schurmanns* decided that where a British ship damaged a foreign ship by a collision within three miles from the shore of the United Kingdom (*i. e.*, within British jurisdiction), the provisions of "The Merchant Shipping Act, 1854," limiting the liability of the owner of the British ship, were applicable. The case of the *Wild Ranger* was a case of collision upon the high seas between a British and a foreign vessel, in which the foreign vessel was at fault, and it was held that the foreigner was not entitled to any limitation of his liability. It thus appears (as was said in the argument) that prior to "The Merchant Shipping Act Amendment Act" all the questions which could arise in cases of collisions between foreign and British ships, in which the British ship was in fault, had been decided, except the case now in

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question; but against the right of the British owner in such a case to a limitation of his liability, very strong observations had been made by Vice-Chancellor Wood in *Cope v. Doherty*, which his Honour repeated in the *General Iron Screw Collier Company v. Schurmanns*. In this state of the decisions "The Merchant Shipping Act Amendment Act, 1862," passed, and instead of the words "no owner of any sea-going ship," in the 504th section of the original Act, introduced the words in the 54th section upon which all the difficulty has arisen, viz., "the owners of any ship, whether British or foreign." It was contended on the part of the appellants, that as the legislature had no power to restrict the common natural rights of foreigners, except as to matters occurring within the limits of British territory, therefore, although the word "foreign" could not be rejected from the Act, yet the words "within British jurisdiction," or some equivalent words, must be implied for the purpose of restricting its meaning. It would be difficult, however, to supply restrictive words to this section in the partial manner proposed, because the intention of the legislature, as far as it can be collected from the language employed, seems to be to place British and foreign ships on the same footing. And besides, this qualification of the word "foreign" (as was pointed out during the argument) would make the 57th section (so far as the words "otherwise relating to collisions" extend), a mere repetition of the 54th, and would thereby render it wholly unnecessary. Assuming, then, the word "foreign" to be taken without the restriction contended for, in what way can it be said that the provisions of the 54th section of the Act interfere with what are called the natural rights of foreigners? In the 54th section there is no reference to the Court of Admiralty, or to any other Court, but a mere enactment that the owners of a ship occasioning damage or loss shall not be answerable in damages beyond a certain amount. The appellants say that the moment a collision occurs, there is a lien upon the vessel which is in fault, and supposing the vessel injured to be a foreign one, that the foreigner immediately acquires this lien to the extent of his damage, and cannot be deprived of it by the municipal law of this country. But suppose the foreigner, instead of proceeding *in rem* against the vessel, chooses to bring an action for damages in a Court of Law against the owners of the vessel occasioning the injury, the argument arising out of the acquired lien would be at once swept away, and the rights and liabilities of the parties be determined by the law, which the Court would be bound to administer. And it may be asked what breach of international law or interference with the natural rights of foreigners is pro-

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duced by the legislature saying that all suitors having recourse to our Courts to obtain damages for an injury from a person not himself actually in fault, but being responsible for the acts of his servant, shall recover only to the value of the thing by which the loss or damage was occasioned, estimated in a particular manner ?

It is to be observed that, under this view of the 54th section, the foreigner will be entitled to the benefit of the Act, as well as the British owner of a ship occasioning damage, and he will therefore not be exposed to a more extensive liability than the British subject.

There may be still some little difficulty remaining upon this construction of the 54th section of the Amendment Act, arising out of the words of the 57th and 58th sections of that Act. If the words in the 57th section, "all provisions of this Act relating to such regulations, or otherwise relating to collisions;" and in the 58th section, "or any provisions of this Act relating to collisions," extend to the provisions of the 54th section as to limitation of liability in damages for a collision, then those provisions would apply to foreign ships only when they were within British jurisdiction, or when beyond the limits of British jurisdiction, where, for the purpose of establishing reciprocity, an order in Council has been made directing that the provisions of the Act shall apply to the ships of the foreign country. But, looking to the heading which immediately precedes these sections, describing the sections which follow as containing "arrangements concerning lights, sailing rules, salvage, and measurement of tonnage in the case of foreign ships" (none of which subjects apply to the limitation of liability), and considering the language of the 57th and 58th sections, the words "relating to collisions" would seem more naturally to refer to regulations respecting collisions themselves than to provisions which are applicable only after collisions have occurred, and are but a consequence of them.

Decree affirmed,
and appeal
dismissed with-
out costs.

Their Lordships are of opinion that the order or decree of the learned Judge of the High Court of Admiralty is right, and they will humbly recommend to her Majesty that it be affirmed, and that the appeal be dismissed; but having regard to the great difficulty and importance of the question, their Lordships will recommend that it be dismissed without costs.

Rothery & Co., proctors for the owners of the *Marie de Brabant*.

Dyke & Stokes for owners of part of the cargo.

Pritchard & Sons for owners of the *Amalia*.

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THE CORNER.

Bail-bond by Sureties—Communication by Telegraph—Second Arrest—Admiralty Court Rules, 42, 43, 51, 54.

By the practice of the Admiralty Court, sureties to a bail-bond must not be partners.

A vessel released from arrest upon a bail-bond taken before a commissioner in the country and signed by two persons in partnership, ordered to be re-arrested notwithstanding the twenty-four hours' notice of the bail tendered had, as required by the 43rd of the Admiralty Court Rules, 1859, been given to the plaintiff's agents in London; the plaintiff's solicitor in the country having within that time given to the defendant's solicitors there formal notice of objection to the bail.

The objection to the bail having proved to be unfounded, the plaintiff condemned in costs and damages.

The omission of the plaintiff's country solicitor to order by electric telegraph a caveat release to be entered, held in the circumstances not to amount to negligence.

THIS was a motion to order a second arrest to issue against the ship *Corner*. The ship having been arrested in the sum of 1,300*l.* at Liverpool, a bail-bond to that amount was there signed on the 23rd of October, 1863, before a commissioner, by John George Widdicombe and Charles Bayley Bell, both of Liverpool, and sent by Messrs. Duncan, Squarey and Blackmore, the defendant's solicitors, to Mr. Rothery, the defendant's proctor in London, to be filed in the registry. About 1 o'clock on Saturday, the 24th of October, the usual notice of the bail was given by Mr. Rothery, the defendant's proctor, to Messrs. Sharpe and Parker, the plaintiff's agents (solicitors) in London; and on Monday, the 26th of October, about 3 p.m., the bail-bond was filed in the registry, and a release of the ship forthwith thereupon taken out. The release was then placed in the hands of the marshal of the Court, who by that post instructed the collector of customs at Liverpool, and on Tuesday, the 27th of October, that officer removed the arrest of the ship.

To ground the motion, the plaintiff filed the following affidavit of Mr. Clare, his solicitor, in Liverpool:—

“ 1. That in the morning of Monday, the 26th day of October instant, I received from my London agent a notice that John George Widdicombe and Charles Bayley Bell were tendered as bail in this suit, and this was the first intimation that I had of their being so tendered.

“ 2. That on the morning of the same day a clerk from the solicitors of the defendant came over to my office and inquired if I would accept such bail as aforesaid. I replied that the bail

1863. was bad on the face of it, as they were partners, and I could not
 November 8. waive the objection without instructions. The said clerk there-
 upon said, 'we know that the bail is bad if you object, and that
 is why we ask if you will accept them. If you object, we must
 put in other bail.' "

"That on the same day I wrote to defendant's solicitors a letter,
 of which the following is an extract:—

" 26th October, 1863.

" *The Corner.*

" Dear Sirs,

" We cannot accept Messrs. Widdicombe and Bell's
 bail, and must intimate that we shall have to scrutinize narrowly
 whoever is offered, as we must have *substantial* bail.

" Messrs. Duncan & Co.,
 " Solicitors."

" 3. That the letter of which the foregoing is an extract was
 delivered to the defendant's solicitors, Messrs. Duncan & Co.,
 not later than 2 p.m. on Monday, the 26th instant.

" 4. That the above-named John George Widdicombe and
 Charles Bayley Bell carry on business in partnership at Liver-
 pool as shipbrokers.

" 5. That I have made inquiry as to the pecuniary position
 and means of the said John George Widdicombe and Charles
 Bayley Bell, and the result of the best inquiry I have been able
 to make is, that they, the said John George Widdicombe and
 Charles Bayley Bell, are not adequate and sufficient bail."

The 42nd, 43rd, 51st, and 54th of the Admiralty Court Rules,
 1859, are as follows:—

42. Bail may also be taken under a special commission, or
 before standing commissioners to be appointed by
 the judge; but in every such case the sureties shall
 justify.

43. A bail-bond taken before a commissioner appointed
 under a special or standing commission shall not be
 filed in the registry until after the expiration of twenty-
 four hours from the time when a notice, containing the
 names and addresses of the sureties and of the com-
 missioner before whom the bail was taken, shall have
 been served upon the adverse proctor; and a copy of
 the notice, verified by affidavit, shall be filed with the
 bail-bond.

51. A proctor who shall have filed a bail-bond in the sum
 in which the cause has been instituted, or paid such
 sum into the registry, and, if the cause be one of

salvage, shall have also filed an affidavit as to the value of the property arrested, shall be entitled to a release for the same, unless there be a caveat against the release thereof outstanding in the "Caveat Release Book."

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November 3.

54. A party delaying the release of any property by the entry of a caveat shall be liable to be condemned in costs and damages, unless he shall show to the satisfaction of the judge good and sufficient reason for having so done.

R. G. Williams, in support of the motion.—The bail given was bad, the sureties being partners, as the defendant's solicitors clearly knew. [The Registrar here stated that the practice in the marshal's office and the registry was not to accept persons as bail who were partners.] An undue advantage was thus taken by the defendant's solicitors; and the plaintiff's solicitor objected immediately it came to his notice. A second warrant is necessary to restore the plaintiff to his right.

Lushington, contra.—The release was taken out in ordinary course after the elapse of the prescribed twenty-four hours' notice to the other side. This interval was doubtless chosen, as giving fair opportunity to plaintiff to object to bail tendered, as well as for the purpose of protecting defendants against unnecessary delay in obtaining a release of their property. The plaintiff's solicitor might have stopped the issue of the release on the Monday morning by a telegraphic message, ordering a caveat release; and communication by telegraph, at least in such cases as this, must now be taken to be an ordinary means of communication. Failing to do so, the plaintiff is now estopped from objecting to the bail simply because they are partners. Such an objection may be sufficient, if urged in due time, but not otherwise. A bail-bond signed by partners is not a nullity, but an irregularity only, and may be in point of fact perfectly sufficient. In the present case the sureties justified, and were approved by the commissioner. The conversation between the plaintiff's solicitor and the clerk to the defendant's solicitor, which may be capable of explanation, is even if unexplained immaterial. This motion is without precedent, and is an attempt to avoid the effect of the laches of the plaintiff's own solicitor.

Williams, in reply.—It is true that the defendant has complied with the letter of the rules; but it is also clear that such rules require equity and fair dealing. The plaintiff's solicitor, it is

1863. submitted, was not guilty of laches in not telegraphing, after
 November 3. his representations to the defendant's solicitors in Liverpool.

Judgment.

DR. LUSHINGTON.—This is an application to the Court to order a second arrest to issue against this ship, the Corner, which has been released on bail.

The rules of the Court as to taking bail have two objects in view ; one that the property arrested should be detained under the hand of the law as short a while as possible : the other that the plaintiff should not lose the real security of the ship, until he has obtained the security of good and sufficient sureties. Both these objects are of great importance.

In the present case bail was taken in Liverpool before a commissioner, about noon of the Saturday ; notice of the bail tendered was served on the plaintiff's agents in London, and about 3 o'clock on the Monday afternoon the bail-bond was filed in the registry, and a release for the ship was taken out the same day. These proceedings in London on the part of the defendant were taken by the proctor, Mr. Rothery, who was acting under instructions from the defendant's solicitors in Liverpool, Messrs. Duncan, Squarey and Blackmore.

The notice of bail served on the plaintiff's agents in London was not received in Liverpool by Mr. Clare, the plaintiff's solicitor there, until the Monday morning ; this is deposed to by Mr. Clare, and considering Sunday to be a dies non, it must be taken that in the ordinary course of business the notice would not have been received by the solicitor in Liverpool until the Monday morning.

Omission to telegraph, in the circumstances, not negligence.

Upon these facts the first question is, was there any undue delay on the part of the plaintiff's solicitor in objecting to the bail ? It has been argued that immediately upon receipt of the notice he might and that he ought to have at once telegraphed to his agents in London to enter a caveat release ; but I cannot hold that a mere omission to use the electric telegraph amounts to negligence.

The solicitor did not telegraph, but on the same morning a clerk from the defendant's solicitors called at his office and asked if there was any objection to the bail, and he was at once told that the bail was bad on the face of it, as the sureties were partners. The clerk replied, " We know it is bad, and if you object to it, we must find other bail." It appears, then, that the sureties were partners, which is contrary to the rule in the registry, that this fact was known to the defendant's solicitors who had tendered the bail, and that objection to the bail was thus verbally made to the defendant's solicitor on this ground.

But the plaintiff's solicitor did more, for on the same day he delivered to the defendant's solicitor a letter formally objecting to the bail. In these circumstances, looking especially to the scrupulous good faith which must be required of all parties in the observance of these rules relating to bail, I am of opinion that the plaintiff's solicitor was entitled to expect that the defendant's solicitors would take measures to prevent the release being taken out upon the improper bail-bond, or at any rate that the plaintiff is now entitled to a second arrest of the vessel, in order that he may recover his real security, or obtain proper and sufficient bail.

1863.

November 3.Second arrest
allowed.

Upon this judgment having been delivered, the defendant's proctor on the same day served notice on Messrs. Sharp and Parker, the plaintiff's solicitors, tendering Mr. Widdicombe and a Mr. Mac Carman as bail; and upon the elapse of twenty-four hours, viz., on the 4th of November, filed in the registry a bail-bond executed by them before a commissioner in the country with affidavits of justification. The plaintiff, however, had filed a caveat against the release of the vessel, and a correspondence ensued between the solicitors, the plaintiff's solicitors objecting to the sufficiency of Mr. Widdicombe, and refusing to remove the caveat.

On notice of motion to order the caveat to be removed being filed by the defendant's proctor, the plaintiff filed affidavits by Mr. Clare, his solicitor, and by a Mr. Welsby, to the effect that they had made inquiry, and believed that Mr. Widdicombe was not sufficient bail for 1,300*l*.

Lushington, in support of the motion.—The defendant is entitled to his release by the 51st rule, and by the 52nd rule the plaintiff is liable in costs and damages, unless he shows good and sufficient ground for his caveat. The affidavit of the sureties, and the approval of the commissioner, are not to be overruled by hearsay affidavits of the other side.

November 11.

R. G. Williams, contra.—There is a bonâ fide objection to the bail, and the Court will not take away the plaintiff's lien until the sufficiency of the bail is well determined.

DR. LUSHINGTON.—The only question here is the sufficiency of the bail, and how it is to be determined. Since I have been in the profession, bail has been taken in the Admiralty registry to the amount of two or three millions; and I hardly know of any

Judgment.

1863.

November 11.

Question of
sufficiency of
bail to be re-
ferred to the
Registrar.

instance of the marshal having been mistaken in his report, or of any instance of objection to bail being brought before the notice of the Court. Practice in such cases there is none. I shall take this course. I shall refer the matter to the Registrar to determine with all despatch. If the objection to the bail proves unfounded, the plaintiff must pay all costs and damages occasioned by the detention of the vessel.

The Registrar accordingly appointed the 13th of November for the inquiry. After he had done so, the plaintiff's attorney gave notice on the 12th of November to the defendant's proctor, that the caveat was withdrawn and the vessel was again released.

November 17. *Lushington* moved for costs and damages from the time of filing the caveat until the second release : Rules 51, 54.

R. G. Williams, contra.

DR. LUSHINGTON.—The vessel having become entitled to a release, the burden of proving a right further to detain her lies on the party entering the caveat. The first caveat was justifiable, as the sureties offered were partners, and so far the plaintiff was not to blame. Afterwards, however, an objection was taken to Widdicombe, which proves to have been unfounded. By r. 54, "a party delaying the release of any property by the entry of a caveat, shall be liable to be condemned in costs and damages, unless he shall show to the satisfaction of the judge good and sufficient cause for having so done." I am of opinion that no good and sufficient reason for objecting to Widdicombe has been made out, and therefore condemn the plaintiff in costs, and damages, if any, from the 4th to the 12th of November.

Sharpe & Parker, solicitors to the plaintiff.

Rothery, proctor for the defendant.

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December 9.**In the Privy Council.****Present—LORD KINGSDOWN.****The LORD JUSTICE KNIGHT BRUCE.****The LORD JUSTICE TURNER.****CARGO EX GALAM.*****Lien for Freight and General Average—Reasonable Time to repair or trans-ship—Respondentia Bond—Precedence of Liens—Practice as to Underwriters being Parties in the Admiralty Court.***

If in the course of a voyage a ship carrying cargo is damaged by perils of the seas, the shipowner, intending to carry the cargo to destination, is entitled to a reasonable time for repairing his ship or for trans-shipping, and for this purpose to retain the cargo.

If he is prevented from carrying the cargo to destination by the act or default of the owner, he has a possessory lien on the cargo for the entire freight, and for contribution to any general average expenses incurred.

The practice in the Admiralty Court is for the original owners of maritime property to be the parties in a cause, although they have abandoned the property to underwriters and received from them payment as for a total loss.

The Court of Admiralty is bound to recognize a possessory lien for freight and general average contribution.

A cargo which had been discharged from a condemned French vessel was lying in the island of Terceira. The owner in England chartered a ship for a lump sum to go out and bring the cargo to one of several ports (according to orders to be given at Scilly or Falmouth, the port of call); one of these ports was Hamburgh. In accordance with this charter the ship proceeded to Terceira and took on board the cargo, upon which, unknown to the shipowner, who also acted as master, there was a respondentia bond given to pay other expenses than the expenses of carrying on, and made payable at Falmouth, which was not one of the ports of destination specified in the charter. In the voyage to England the ship was stranded at Scilly, and general average expenses were incurred, and the cargo was landed and stored (23rd February) in the shipowner's name. The charterer, who was aware of the bond, ordered the shipowner (25th February) to carry the cargo to Hamburgh. Thereupon the cargo was arrested by Admiralty warrant (4th March) at the suit of the respondentia bondholder. The owner not appearing, nothing was done by any party until the 23rd of May, when the cargo was removed to London by order of the Court, and then sold. The shipowner, however, in the meanwhile settled with his underwriters on ship and freight, nearly upon the terms of a total loss. The legal origin of the bond was not disputed.

Held, reversing the decision of the Admiralty Court, that the shipowner was prevented from carrying on the cargo by the default of the owner; that he therefore had a possessory lien on the cargo for his full freight and general average; and that such lien must be satisfied in preference to the respondentia bond, upon the ground that so carrying the cargo, the shipowner had rendered services in the nature of salvage to the bond.

IN the Admiralty Court Robert MacAndrew and Company, merchants of the city of London, brought an action against

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the cargo, which had originally been laden on board a ship called the Galam, suing upon the following bond of respondentia, of which they were the holders.

The defendant was Philip Cleary, of St. John's, Newfoundland, the owner of a barque called the Mary Jane, which had carried the said cargo from Terceira to England. He in fact also represented, as hereinafter mentioned, certain underwriters on the freight of the Mary Jane, who had paid him as for a total loss on the freight insured by them.

The circumstances of the case were as follows:—The French ship Galam, of Bordeaux, on her voyage from Hayti to Europe, became unseaworthy, and in November, 1860, put into Angra, in the island of Terceira, Azores, where she was condemned, and her cargo, consisting of logwood, was discharged and warehoused in the custom house there. On the 5th January, 1861, the captain of the Galam gave the aforesaid respondentia bond on the cargo, making the same payable (as appears in the bond) ten days after arrival at Falmouth. Meanwhile on the 31st December, 1860, Mr. Arthur B. White, of London, the owner of the said cargo of logwood, chartered of the defendant Philip Cleary, the then owner and master, the ship called the Mary Jane, belonging to the port of St. John's, Newfoundland, which was then lying at Bristol. By this charter-party the Mary Jane was to proceed in ballast immediately to Angra, and there load from the factors of the charterer the cargo of the condemned vessel, the Galam, (or if the same had been shipped by the authorities, then a cargo of lawful merchandise,) and to proceed therewith to Queenstown, Falmouth, or Scilly for orders, to discharge at a safe port not north of the Tyne on the east coast, nor north of the Clyde, including Renfrew on the west coast of the United Kingdom, all Ireland and London excepted, or at Hamburgh, Bremen, Rotterdam, or Antwerp. Orders to be given within four days after arrival at port of call. The freight (470*l.* or 500*l.*, according to the port of discharge) to be paid on unloading and right delivery of the cargo. The master to sign bills of lading as tendered without prejudice to the charter, the captain or owners having an absolute lien on the cargo for all freight, dead freight, and demurrage.

In pursuance of this charter, Mr. Cleary proceeded with the Mary Jane to Angra, arriving there on the 4th February, 1861, when he reported himself to Manoel Joaquim Dos Reis (the agent of the charterer), by whom and at whose expense the cargo of logwood, which had been the cargo of the Galam, was shipped on board the Mary Jane. At the time of the cargo being thus

ipped, Cleary had no notice or knowledge of the respondentia bond. The Mary Jane proceeded on her voyage for the United Kingdom, with directions to call at Scilly for orders, but on the 1st February, 1861, while in the prosecution of her voyage, she was stranded by a storm at Tresco, off Scilly. On the following day, the 22nd February, 1861, a survey was held on the ship, which resulted in expectations that she might be got off, and on the 22nd or 23rd of February a small portion of the cargo, chiefly deckload, was in pursuance of the surveyors' recommendations landed by and at Cleary's expense on the beach, for the purpose of getting the ship off the rocks, and was retained and taken charge of by his agents, Messrs. Banfield & Sons, of Scilly. On the 23rd of February, 1861, the ship was got off, and brought into St. Mary's harbour, Scilly, and between the 6th of February and the 5th of March the remainder of the cargo was, in accordance with a survey, discharged, by or under Cleary's orders and at his expense, and was with the deck-load stored in warehouses at Scilly, belonging to Messrs. Banfield & Sons, in the name of Cleary, and subject to his lien and right of detention for freight, and for his claim for general average or salvage and other expenses.

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"As security for the repayment of this amount he declares to mortgage, as he doth hereby mortgage, on behalf of Mr. Frederico Auguste Vasconcellos, 479,000 pounds of Campeachy, being the entire cargo of the ship Galam, of Bordeaux, which he commanded, and at this time existing in the customs warehouses of Angra.

"The said sum of 24,583f. shall be repaid by Mr. Arthur B. White, of London, to the said Frederico Auguste Vasconcellos, or his order, ten days after safe arrival of the cargo at its destination.

"He shall, moreover, and on the same occasion, pay to the said Frederico Auguste Vasconcellos, or his order, interest on the said sum which they have agreed, at the rate of 30 per cent., which interest, added to the sum lent, forms an amount to be paid by the owners of the cargo of 31,957f. 90c.

"The lender is not to contribute to simple average, and will only be bound with respect to risk at such times and places as are fixed by law.

"It is clearly agreed that the said sum lent, together with the maritime interest, is to be paid at the first port of destination in Europe, which is to be Falmouth, ten days after the arrival of the vessel thereat.

"The parties respectively submit for the execution of the present bottomry bond to all penalties, privileges, and generally to all

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the provisions of the maritime laws and commercial code, in matters concerning bottomry bonds.

“ Done in triplicate original, &c.

Jean Felix Nean.

Frederico A. Vasconcellos.

Bottomry Bond.

Vice-Consulate
of France
at Terceira.

Before us, André Francisco Meirelles do Canto e Castro, Vice-Consul of France, at Terceira, Azores, appeared Messrs. Jean Felix Nean, late captain in command of the ship Galam, of Bordeaux, captain of long sea voyages, and Frederico Auguste Vasconcellos, of Angra, merchant.

“ Who agreed what follows to wit.

“ Mr. Jean Felix Nean acknowledges that Mr. Frederico Auguste Vasconcellos has, at this present time, lent and advanced to him, under denomination of loan on bottomry, the sum of 24,583f.”

Messrs. Banfield & Sons, on the 22nd February, 1861, being the day after the ship was stranded, wrote to Mr. White, the charterer of the Mary Jane, advising him that she had arrived at Scilly, and had been run on shore to save ship and cargo. Mr. White duly received this letter on the 25th of February, and on the same day wrote a letter to Messrs. Banfield, containing the following paragraph :—“ Unless you should receive contrary orders from me by telegraph or by letter before she proceeds to sea, please to order the captain to proceed to Hamburgh for the discharge of his cargo.” These orders were subsequently confirmed on the 2nd of April.

On the 4th of March, 1861, the cargo, which was still in the warehouse of Messrs. Banfield & Sons, at Scilly, was arrested by the plaintiffs as holders of the respondentia bond. The Mary Jane was afterwards condemned ; and being insured in the sum of 1,600*l.*, and her freight insured in the sum of 450*l.*, notice of abandonment of ship and freight was given to the underwriters thereof respectively ; but they did not accept the same. However, on the 25th March, 1861, the underwriters on ship agreed to settle with the defendant in respect of the ship and to pay seventy-five per cent. in liquidation of all claims, the defendant retaining the right to the damaged ship ; and on the same day the underwriters on freight, to the extent of 425*l.*, agreed to pay as for a total loss, it being agreed that they should be entitled to the charter-party, with liberty to send on the cargo

and to collect the amount of freight as per charter-party, the defendant being bound to give his assistance in having the cargo sent forward, but to be entitled to the proportion of general average and charges applicable to cargo and freight. On the 12th of April, 1861, the amount of general average contribution due from the cargo to the Appellant was adjusted in the ordinary way by an average stater, to whom the matter was referred by the owners and underwriters on ship, freight and cargo. The consent of the bondholders to this adjustment was not asked or given. Subsequently, the defendant received from the underwriters on freight 400*l.*, the remaining 50*l.* being still unpaid; and on the 13th of April, 1861, he was authorized and requested by the underwriters of the freight to enter an appearance in the cause, to claim the freight and to maintain his right to carry on the cargo to Hamburgh. The cargo, however, being detained under arrest, and no further steps being taken by the bondholders, nor any appearance being entered on behalf of Mr. White, the owner, no appearance was at this time entered in the name of the defendant. On the 1st of May, 1861, the defendant left Scilly for Newfoundland: before doing so, he sold the ship, and executed a power of attorney in favour of Messrs. Banfield, appointing them his attorneys for the purpose of taking on the cargo to Hamburgh, should it be released from arrest, as also for protecting his rights in respect of freight and general average. No actual step however for carrying on the cargo was taken by the defendant or by Messrs. Banfield, or by the underwriters on freight.

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On the 18th of May, 1861, the bondholders filed a notice of sale of the cargo, and thereupon, to prevent the sale of the cargo, an appearance was, on the 22nd of May, entered in the name of the defendant in the action as "the party entitled to receive the freight for the transportation of the cargo (such freight not having been hypothecated under the bond proceeded on) and to general average."

On the 23rd of May, and again on the 30th of May, 1861, application was made to the Court by the bondholders for a commission to the marshal of the Court, to remove the cargo from Scilly to London for sale; and the Court granted the application of the bondholders, without prejudice to any lien of the defendants.

A commission of removal thereupon issued to the marshal.

Meanwhile and before the order of the Court was made, namely, on the 27th of May, 1861, Mr. Waddilove, the proctor

1863. for the defendant, had written the following letter to Messrs.
July 22, 27. Clarkson & Son, the proctors for the bondholders:—
December 9.

“Doctors’ Commons,
 “27th May, 1861.

“Cargo ex Galam.

“Dear Sirs,—

“For the interests of your parties I beg to inform you that Mr. Cleary, the owner and master of the *Mary Jane*, is prepared to *carry on* the cargo of logwood lately landed from his vessel the *Mary Jane*, and warehoused at Scilly, upon its being released from the arrest of the High Court of Admiralty, and thereby enabling him so to do.

“I am, dear Sirs,

“Messrs. Clarkson,

“Yours truly,

“Doctors’ Commons.

“CYRUS WADDILOVE.”

The substitute of the marshal at Scilly, Mr. Richardson, in consequence of a letter received from Messrs. Clarkson, the proctors for the bondholders, applied to Messrs. Banfield, as the agents of the defendant, to carry on the said cargo to London; but they refused so to do, and thereupon the marshal caused the warehouse expenses to be paid, and sent the cargo to London, at the expense of 237*l.* 14*s.* 4*d.*

The cargo having been sold, and the proceeds paid into Court—

A motion on affidavits was made on the 30th of October, 1861, to the Court to direct the sum of 727*l.* 9*s.* 1*d.*, the same being

For freight . . .	475	0	0	} as per charter-party
With gratuity of . . .	5	5	0	
And for general average	247	4	1	
	<hr/> £727 9 1 <hr/>			

or such other sum or sums as to the said Judge might seem meet, to be paid out of the proceeds of the sale of the said cargo to the defendant.

The proctors for the bondholders objecting thereto, the Judge allowed them to be heard on their petition in objection to the application. Thereupon a petition and other pleadings were filed.

When the case came on for hearing, the learned Judge pronounced for the respondentia bond, together with interest

hereon, at the rate of 4*l.* per cent. per annum from the time when the bond became due until payment, and decreed the sum of 819*l.* 6*s.* 10*d.*, the amount of the net proceeds of the cargo actually laden on board the Galam remaining in the registry, to be paid out to the plaintiffs in part satisfaction of the bond, and condemned the defendant in costs.

The judgment of the Court of Admiralty, as to the claim for freight, was founded on a finding of fact that the appellant had abandoned the voyage, and was therefore not entitled to freight; and as to the appellant's claim for general average that the Court of Admiralty had no jurisdiction to enforce such a claim.

From this judgment the defendant appealed.

Brett, Q.C., and *Lushington* for the appellant.—(1) The appellant had a possessory lien on the cargo for the full chartered freight. Upon the accident happening at Scilly he had a right to a reasonable time for repairing, or if that was impossible, then for trans-shipping. This right is necessarily implied from the right to earn freight by trans-shipment, which is declared by the authorities: *Gratitude* (a); *Shipton v. Thornton* (b); *Parsons on Mar. Law* (c). We admit that if the appellant abandoned the voyage at Scilly, he forfeited his right to all freight, but the evidence disproves any such intention; and we submit that looking to all the circumstances of the case and especially the arrest of the cargo, a reasonable time for trans-shipment had not elapsed on the 30th of May, when the cargo was removed by the order of the Court to London and sold. In *Hadley v. Clarke* (d) and *The Newport* (e), cases somewhat similar, a much longer time had elapsed. Upon the cargo being taken to London, it then became impossible to carry it to its destination, but the appellant was prevented from doing so by the act of the respondents in holding the cargo under arrest, and the default of Mr. Arthur B. White, the owner, in not obtaining its release on bail. As against both parties therefore the appellant had a right to his lien for full freight. The prize cases of the *Hoffnung* (f) and the *Martha* (g) illustrate this position. In both cases, upon the capture of a neutral ship and unloading of the cargo, full freight was decreed to the ship and made a charge on cargo, though the cargo was ultimately restored.

(2) The appellant had likewise a lien upon the cargo for his salvage and other general average expenses: *Arnould on In-*

(a) 3 C. R. 259, 261.

(b) 9 A. & E. 314, 335.

(c) Vol. i. p. 158.

(d) 8 T. R. 259, 265.

(e) Swabey, 335.

(f) 6 C. R. 232.

(g) 3 C. R. 106, n.

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insurance (a); *Scaife v. Tobin* (b); *Simonds v. White* (c). No tender of any sum was made to satisfy this lien; but the amount has been assessed in the ordinary way.

Though there is no original jurisdiction in the Admiralty Court to entertain a claim for contribution to general average, the Court ought to have taken cognisance of the lien. The case of the *La Constancia* (d), and the *North Star* (e), where a general average claim was put forward, and refused, were neither of them cases of lien; in both cases the claim was put forward by owners of cargo. In the prize case of the *Copenhagen* (f), Lord Stowell considered and enforced a claim for general average, referring the amount to the registrar and merchants to be ascertained. The lien for general average stands on precisely the same footing as the lien for freight, or as the marshal's expenses for removal, which the Court below allowed.

(3) Each of these liens being a possessory lien was valid against any other claim, as may be implied from the very nature of a possessory lien: see *The Gustaf* (g); *Legg v. Evans* (h). But on several grounds peculiar to this case the appellant's claim was superior to the claim under the respondentia bond. The appellant was a stranger to the bond, and had no notice of it, though the respondent's principal at Terceira should in justice have given him notice of it; his rights and duties under the charter 31st December accrued before the date of the bond (5th January); and the services for which he claims a lien were beneficial to the bond, in fact the salvage of the bond. The appellant did not contest the validity of the bond in the Court below, inasmuch as all these proceedings were interlocutory; but the bond, if lawfully given, we submit, never became due. The respondents allege that it became due by the deviation or intended deviation from the voyage prescribed in the bond; but the intended deviation was not the act of the borrower or his agent; it was the act of a person who had no duty to the lender of the money, and who was bound by charter-party to obey the direction of a third party, the owner of the cargo. The doctrine of deviation, though justly applicable to bottomry, as then it imports fraud on the part of the borrower, *The Armadillo* (i), does not, we submit, apply to respondentia, least of all when the master of the transshipping vessel has no notice of the bond, and the lender suffering the cargo to be shipped either knows of the charter, or fails to acquaint himself by making due inquiry.

(a) 3rd ed. p. 823.

(b) 3 B. & Ad. 523, 528.

(c) 2 B. & C. 805, 809.

(d) 2 W. Rob. 487.

(e) Lushington, p. 45.

(f) 1 C. Rob. 294.

(g) Lushington, p. 506.

(h) 6 M. & W. 36.

(i) 1 W. Rob. 255.

(4) The appellant's claim ought not to be prejudiced by the fact that, so far as freight is concerned, his underwriters are the parties really interested. By the practice of the Court the appearance was given in his name; and no persons are more entitled to the favourable consideration of the Court than underwriters who have paid upon the policy.

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Twiss, Q. C., and *Clarkson*, for the respondents.—(1) The facts show that all intention to carry on the cargo had been abandoned by the appellant and his underwriters, and therefore there is no valid claim for freight, even *pro ratâ itineris*: *Vlierboom v. Chapman* (a); *Cook v. Jennings* (b).

(2) As to the claim for freight, the master has been paid by the underwriters, and he has no right to receive it again. The underwriters are not parties to this cause.

(3) As to the claim for general average. The learned Judge of the Admiralty Court has ruled not in this case only but in several others, that the Admiralty Court has not jurisdiction over claims of general average: *Johannes Christoph* (c); *La Constantia* (d); *North Star* (e).

(4) The plaintiffs have a maritime lien arising out of their *respondentia* bond; and that bond became due upon the abandonment of the stipulated voyage: *Draco* (f); *Helgoland* (g). But for such right accruing upon the abandonment of the voyage, whether fraudulently or otherwise, the lenders upon *respondentia* could have no control over the property which is their only security.

(5) The maritime lien of the respondents is superior to the defendant's claim, as in priority of date and also in legal privilege. A maritime lien follows the property into whosoever possession it may come: *Bold Buccleugh* (h); *The Aline* (i).

Lushington replied.

On the 9th of December, Lord KINGSDOWN delivered the judgment of the Committee.

The circumstances of this case are singular; and though some of the questions of law which have been raised in it are sufficiently clear, others of much general importance seem to be

Facts of the
case.

(a) 13 M. & W. 230.

(b) 7 T. R. 381.

(c) 2 Spinks, 99.

(d) 2 W. Rob. 487.

(e) *Lushington*, 45.

(f) 2 Sumner, 193.

(g) *Swabey*, 491.

(h) 7 Moore, P. C. 284.

(i) 1 W. Rob. 111.

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involved in some doubt. In the year 1860 Mr. White, a merchant in London, shipped in Hayti on board of a French ship called the Galam, of which Jean Felix Nean was master, a cargo of Campeachy wood, to be brought to Europe. In November, 1860, the Galam became, as it is alleged, unseaworthy, and put into the port of Angra, in the island of Terceira, where she was condemned, and her cargo discharged and stored in the custom-house there. The captain of the Galam took up a large sum of money, amounting to about 1,000*l.* English money, on the security of the cargo, and granted a respondentia bond for the amount, payable, with interest at 30 per cent., on the arrival of the cargo at her first port of destination in Europe, which was declared to be Falmouth; and this bond was afterwards transferred to the respondents, the present holders. Captain Nean having raised this money, does not appear to have done anything for the purpose of forwarding the cargo to its destination.

Information of the accident, however, was given to Mr. White, the owner, who chartered a ship called the Mary Jane, then lying at Bristol, of which Philip Cleary, the appellant, was master and owner, to proceed in ballast to Angra, and fetch home the cargo. By the charter-party, which was dated the 31st December, 1860, it was agreed that the ship having taken on board the cargo, should call at Queenstown, Scilly or Falmouth, for orders, and should carry on and deliver the cargo at any port fixed by the orders, within certain limits specified in the charter-party. The port of London, for some reason which does not appear, was expressly excepted from the ports of discharge: the freight was to be 450*l.* if the cargo were delivered at a port of the United Kingdom, and 475*l.* if discharged at Hamburgh, which was within the prescribed limits.

The Mary Jane set out on her voyage accordingly, took on board the timber, and on her return voyage called at Scilly for orders; but on arriving there she was, by violence of weather, driven ashore, and it became necessary to unship and store the cargo, which was done in the yard of Messrs. Banfield & Co., of Scilly, who state that they received it on behalf of Captain Cleary, and subject to his claims upon it by way of lien. Considerable expenses are alleged to have been incurred in saving the ship and cargo, in respect of which Captain Cleary makes a claim on the cargo for general average. Messrs. Banfield & Co. immediately informed White by letter of what had happened, and at the same time advised him that it was expected that the ship would be got off the shore.

On the 25th February, 1861, White, in answer to this communication, sent the following letter to Banfield & Co. :—

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“ Dear Sirs,

“ I received this morning your favour of the 22nd instant, announcing the arrival at your port of the *Mary Jane*, from Terceira, and that she slipped her cables in a hurricane, and ran on to the shore at Tresco to save ship and cargo, and that you were making efforts to get her off, and hoped to succeed.

“ Unless you should receive contrary orders from me by telegraph or by letter before she proceeds to sea, please to order the captain to proceed to Hamburgh for the discharge of his cargo.

“ There is a bottomry bond on the cargo for more than its value ; therefore he must not deliver said cargo until his freight is paid, and of course any expenses incurred on your part or elsewhere, for repairing, will have to be raised by a bond, which will take precedence of the one from Terceira, and there will be ample to cover this latter and freight, leaving something to account against the former one.

“ I remain, &c.,

“ ARTHUR B. WHITE.

“ Inclosed a letter for Captain Cleary, which please deliver to him.”

It appears by this letter that White at this time was apprised of the respondents' bond which had been granted at Angra, and that he determined to adopt a course which was calculated to defeat it by diverting the cargo from Falmouth, on arrival at which place only the bond was made payable. At what time White first became acquainted with the fact of the bond having been given does not appear ; but there is nothing to show that before this letter was received, Cleary had ever heard of or had any reason to suspect the existence of such bond.

The respondents having discovered the directions given by White as to the destination of the cargo, immediately instituted a suit in the Admiralty Court on the respondentia bond, and gave White notice of the proceedings, and on the 4th March, 1861, they procured the cargo to be arrested in Scilly by a warrant out of the Court of Admiralty. White refused to appear to the action, the charges upon the cargo being, as it seems from his letter, beyond its value. Cleary of course could not be required or expected to give bail ; and, on the other hand, till the warrant of the Admiralty was removed, the cargo could not be carried on to its destination, whatever that destination might be.

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The master of a vessel is entitled to recover his freight, if he has been prevented from carrying the cargo to destination by the act or default of the owner; and if by the occurrence of an accident on the voyage delay be occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transshipping it to another vessel. Did Cleary or his underwriters abandon the voyage?

The rule of law is very clear, and was not disputed at the bar—that the master of a vessel is entitled to recover his freight if he has either carried his cargo to its destination, or has been prevented from so carrying it by the act or default of the owner; and if by the occurrence of an accident on the voyage delay be occasioned, the master may claim a reasonable time to carry on the cargo either in the same ship when repaired or by transshipping it to another vessel.

It is said, however, in this case that the master had abandoned the cargo to its fate, and was not prevented by the proceedings in the Admiralty Court from carrying it on; that he never intended to do so if no such proceedings had been taken, and that therefore he is not entitled to any freight.

With a view to this question it becomes material to examine with some minuteness what actually took place. Cleary had insured both the ship and the freight with the same underwriters. On the 25th March, 1861, his agents came to a settlement with them for the loss both on the ship and cargo. The terms as to the ship were that he should receive 75 per cent. on the value, and take the ship for his own account. He obtained a settlement with the underwriters at the same time on the freight as for a total loss, but the terms on which this settlement was made entitled the underwriters to stand in the place of Cleary. They are thus stated in the letter of Mackay and Dick, the agents of the insurers, dated at Glasgow, March 25th, 1861, addressed to the agents of Cleary at Greenock:—

“The freight to be treated as a total loss. The underwriters on this footing getting the charter-party, and liberty to send on the cargo, and to collect amount of same as per charter-party; Captain M‘Cleary to give his assistance in having the cargo sent forward.

“It is also understood that you are entitled to the proportion of general average and charges applicable to freight and cargo.”

Shortly afterwards White, in answer to some communication from Banfield & Co., wrote them the following letter:—

“London, April 2, 1861.

“Dear Sirs,

“I have before me your valued favours of 15th ultimo and 1st instant, and have not to alter the orders already given for the Mary Jane to deliver her cargo at Hamburgh; the captain taking care to secure his freight and general average with you, and for shipping the cargo at Angra before parting with the cargo.

"I thank you for informing me that Messrs. Mackay and Dick, 1, Royal Bank Buildings, Glasgow, are now the representatives of the Mary Jane, and are making arrangements for the reshipment of said cargo; but I shall wait to hear from them before addressing them, as I have fulfilled my part of the business by having given the orders, unless some suitable proposition is made to me to induce the discharge in a port of Great Britain.

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"I shall feel obliged by your informing me when the Mary Jane is likely to be ready to reship the cargo, and any other information that you believe may be of interest to me.

"It appears to me that the expenses for shipping the cargo at Angra, according to the document sent you, could be included in your statement of general average; it being certainly that matter, and I have paid same.

"Claiming your excuses for giving you so much trouble,

"I remain, &c.

(Signed) "ARTHUR B. WHITE."

This letter shows that White refused to order the cargo to be taken to London, and insisted on its being carried to Hamburgh, and Cleary, who was bound by his charter-party to carry it to Hamburgh, and not to carry it to London, had no right to disobey the orders of his charterer.

It must be observed that at this time the reshipment of the cargo on board the Mary Jane was contemplated, and that the Mary Jane was still in Scilly, and, as it should seem, under charge of the underwriters. On the 13th April, 1861, the agents of the underwriters wrote a letter of that date to Cleary, urging him to insist, on their behalf, on his right to carry the cargo to Hamburgh, in terms of the charter-party, and to do all things necessary for the recovery of the freight, and authorizing him to appear on their behalf in this suit. Cleary after this seems to have given himself no further trouble about the matter. He sold the Mary Jane, which left Scilly about the 1st of May, and having received the full amount of her freight, or nearly so, from the underwriters, he took himself off to Newfoundland early in May, 1861. Before he went, however, he executed a power of attorney, authorizing Messrs. Banfield & Co. to take the necessary steps for carrying on the cargo to Hamburgh should it be released from arrest, as also for the purpose of protecting his rights in respect of freight and general average; and an appearance in this suit seems to have been entered for the appellant under this authority.

We do not find that any step was taken by any of the parties

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till the latter end of May. On the 25th May an application was made on behalf of the respondents to the Admiralty Court to have the cargo in question removed to London for sale, inasmuch as there was no market for it in Scilly. An order was made for this purpose by the Court, and in obedience to such order the cargo was brought to London in the month of June, 1861, where it was afterwards sold, and realized, after payment of the expenses incurred by the marshal, 808*l.* 8*s.* 10*d.*, which sum was paid into Court, subject to the claims of all parties. On the occasion of this application for the removal of the cargo to London, and on the 27th May, 1861, notice was given by the proctors for the appellant to the proctors for the respondents that the appellant was prepared to carry on the cargo of logwood lately landed from his vessel the *Mary Jane*, warehoused at Scilly, upon its being released from the arrest of the High Court of Admiralty.

Some correspondence took place which it is not material to notice. It is said that at this time the *Mary Jane* had been sold, and there was no vessel in Scilly which could have been employed in carrying on the cargo to Hamburg; but however that may be, the underwriters had been prevented from carrying on the cargo to Hamburg when they had the means of doing so, and the warrant of the Court of Admiralty still prevented them from completing the contract by trans-shipping the cargo to another vessel. Can it be said, then, that there is any evidence to show that the intention to carry on the cargo had at any time been abandoned by those whose right it was to receive the freight?

By the practice of the Admiralty Court the party appearing should be the master or owner, though his claims had been satisfied by the underwriters, and they are the only parties really interested.

The case is in some degree prejudiced by the claims being made in the name of Cleary, who, as far at least as regards the freight, has long since been satisfied every claim which he can have in respect to it. The rules of the Admiralty Court make it necessary that in all suits of this description, the party appearing should be the master or owner, though his claims may have been satisfied by the underwriters, and they are the only parties really interested. He is considered in the Admiralty Court as suing as agent and trustee for them, and the same rule seems to prevail at common law according to the doctrine laid down in *Robertson v. Hamilton* (a).

If we look, then, at this claim as the claim of the underwriters, it seems very improbable that they should intend to abandon their right to earn this freight. By far the greater part of the voyage for which the *Mary Jane* had been hired—out and home

(a) 14 East, 522.

—had already been performed; it remained only to carry the cargo from Scilly to Hamburgh, in order to earn the whole amount of 475*l*. Nor can we say that their conduct amounted to an abandonment of their right to do this. The orders of the Court of Admiralty, occasioned by the default of White, made it impossible to carry the cargo anywhere but to London, and there they were not bound and were not at liberty to carry it. We think, therefore, that they stand in the situation of parties who, having been prevented by the default of the owner of the cargo from completing the voyage, are entitled to claim their freight.

There being then a lien for freight, the next question is whether such lien is preferable to, or to be postponed to the claims under the respondentia bond. It is sworn, and there seems no reason to doubt, that Cleary knew nothing of the respondentia bond when he took on board the cargo. The respondentia bond seems open to great suspicion, though it has not suited the interests of any of the parties in the suit to dispute it. The money raised by it or any part of it seems not to have been applied to forwarding the cargo, and as far as it appears in this case, the captain, Nean, had entirely abandoned the cargo, and it was carried on not by him or by his procurement, but by the act and at the expense of the owner of the cargo. The subsequent carrying on of the cargo was essential to making it available either for the holder of the respondentia bond, or for anybody else. It was in the nature of salvage service, and in a competition of liens the shipowner who has rendered a service of this description is entitled to priority over the holder of a respondentia bond who has done nothing, and whose money has contributed nothing towards forwarding the cargo to its destination. It is upon this sound principle of justice and common sense that, by the regular practice of the Admiralty Court, a prior bottomry bond is postponed to a subsequent one, and both to claims for salvage afterwards arising, and that wages are also entitled to preference. These demands are all for services rendered to the owner of the bottomry bond, as well as to other persons interested in the ship and cargo. We think, therefore, that the claim for freight is entitled to priority over the respondentia bond.

There remains the question of the claim for general average. On principle this seems to stand on the same reason as freight. It is a loss incurred for the general benefit of the ship and cargo, to which those who have received the benefit are by law liable to contribute rateably. And for this claim the master who has incurred the expenses has a lien on the goods. It is a possessory lien at common law, by virtue of which he is entitled to hold the

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The underwriters did not abandon their right to earn freight; and, as they were prevented by the default of the owner of the cargo from completing the voyage (i. e., in not obtaining the release of the cargo on bail), they are entitled to full freight.

The lien for freight is entitled to priority over the claim on the respondentia bond; the carrying of the cargo being in the nature of a salvage service to the bond.

The lien for general average to have the like priority, although the Court of Admiralty may not have original jurisdiction to entertain a claim

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tribution.

goods till his lien be satisfied. If no respondentia bond was in question, there can be no doubt that White could not take the goods out of the hands of Cleary without paying, not only freight, but what is due for general average. But it is said that the Court of Admiralty will take no notice of a claim for general average; and the learned Judge in this case observes, "that over and over again, from the earliest time he entered this Court, the Judges of the Court have refused to entertain this question;" and again, "I must adhere to the practice of not deciding upon questions of average." But unfortunately the judgment does decide the question, and determines that the Court of Admiralty may take a cargo out of the possession of a master who has, by common law, a possessory lien upon it, without satisfying such a lien.

If such be the settled law of the Admiralty Court it must prevail, however contrary to principles usually acknowledged in the administration of justice. But it requires very clear authority to support it, and, upon examination, their Lordships have not found any. To enforce and give effect to a lien at the instance of a party seeking to establish it, is quite a different thing from setting it aside and annulling it when it arises in the Court incidentally in the progress of a cause over which the Court has properly jurisdiction. The captain here does not say, I have by the maritime law a lien which the Court of Admiralty will enforce as it does in cases of bottomry and other cases not depending upon possession; but he says, I am in possession of this cargo, and have a lien upon it, and by the law of England no man has a right to take it out of my possession till that lien is satisfied. If he be right in law, as it appears that he is, how can the Court of Admiralty do that which no other Court in the kingdom could do—destroy a right which exists by law? The case would be quite different if the captain, having parted with the cargo, had sought to enforce a lien in the Court of Admiralty. The lien would be gone (unless there were some special contract) with the loss of possession, and the Court of Admiralty would properly say, We have no jurisdiction in this matter; we have no means of enforcing contracts or compelling contributions; we decline to interfere.

On examination of the cases referred to at the bar, this appears to be all that they have decided—not that when a possessory right of lien arises incidentally before the Court of Admiralty, such right will be treated as a nullity; but that when the Court is called upon to enforce a lien not depending upon possession, or to adjust the rights which grow out of it, the Court will refuse to interfere. Two cases were strongly relied upon by the

counsel for the respondents, the *Constancia* (a) and the *North Star* (b). Neither of these cases sustains the principle now contended for. In the first case the *Constancia* sailed from Lima, having for her cargo amongst other things a quantity of silver. Having suffered damage on her voyage it became necessary to raise money for repairs. A portion of the silver was sold by the master to raise the necessary funds, and other monies required were raised by a bottomry bond on the ship. Two further bonds were granted by the captain for necessary expenses, one on the cargo, and another on the ship.

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Cases of the
Constancia and
North Star
distinguished.

The ship arrived in this country, and was sold in the Admiralty Court, the amount of freight was brought into Court, and also a portion of the value of the cargo equal to the amount of the bottomry bond. In these circumstances the owners of the silver made a claim upon the proceeds in Court for a contribution on a general average to the loss which they had suffered by the sale of their silver. The learned Judge rejected the claim on the ground that it was a mere personal right to be enforced at law; that there was no lien on the ship or cargo for such demand; that the Court of Admiralty, therefore, could not entertain it, and did not possess the means of doing justice amongst the different parties interested if it did interfere. The grounds of the judgment are explained most clearly at page 490:—

“If this be so, and if upon the authority of Lord Stowell, thus confirmed by Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves: first, whether I have any jurisdiction at all over questions of general average? and, secondly, whether I could satisfactorily exercise such a jurisdiction under the circumstances of the case? The absence of any precedent where the Court has exercised the jurisdiction is of itself a strong *prima facie* proof that I have no authority to entertain the question at all, and I am the more strongly inclined to this opinion by the further consideration that in all cases of average it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. I possess no such power; and if I could not bring all parties interested before the Court, I could not adjust a general average, which is a proportionate contribution by all.”

It is obvious that this case has no bearing upon the present; there was in that case no possession by the owner of the silver of any part of the cargo from which contribution was sought, and of course there could be no possessory lien. There was an

(a) 2 Wm. Rob. 487.

(b) Lushington, 45.

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attempt to enforce a supposed maritime law which the Court thought did not exist, and to require the Court to exercise a personal jurisdiction which the learned Judge thought it did not possess, and could not usefully assume.

The case of the *North Star* was substantially to the same effect. The question there was as to the validity of a bottomry bond on a ship. The owners of a cargo who had paid expenses, in respect of which they were entitled to a general average contribution from the ship, had taken a bottomry bond on the ship from the master. It was argued that such right to contribution formed no lien on the ship; that the owner of the cargo had no possession of the ship, and therefore could have no possessory right of her, though the master of the ship had possession of the cargo, and had, therefore, a lien for general contribution, which, however, he lost, if the cargo passed out of his possession. Dr. Lushington disallowed the claim, and made these observations:—

“The next step is to consider these claims in respect of general average, how far they affect the ship and homeward freight. Assuming the claims to be well founded in fact, in what legal category ought they to be placed? Are they liens upon the ship in any legal sense of the term, or are they simply debts—the consignees creditors, the owners debtors? Liens in the common law sense of the term these claims certainly are not. Are they to be considered as maritime liens of the same nature as salvage or damage, to be enforced against the corpus of the ship? I find no authority for such a position. They are demands for which an action might lie, but which the Court of Admiralty has never taken cognizance of. I think these claims are to be considered as conferring rights of personal action only.”

Neither in these cases nor in any other can we find any decision or dictum that when a clear legal right of lien is proved in the Court of Admiralty to exist, that Court can dispose of the property without regarding it, and thus in effect decide against it.

It was said, however, that the respondentia bondholder was entitled to preference, because the holder of such security is not liable to contribute to general average. That is so as between the owner of the cargo and the holder of the bond, but not as between the holder of the bond and those whose lien arises in respect of services by which the cargo itself has been made available.

Upon the whole, their Lordships are of opinion that the claim for freight and general average is the first demand upon the

funds in Court. The respondents, however, must be at liberty to have the claim for general average strictly investigated. Though their Lordships feel themselves compelled, upon principles of law, to advise Her Majesty to reverse the present judgment, and to give to the appellant his freight and what may be found due to him for general average, and his costs of the suit, out of the fund in Court, they think that both his conduct and that of White are open to so much observation, and the facts of the case afford such ground for doubt as to the proper inferences to be drawn from them, that they will not give any costs of the appeal.

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Judgment re-
versed; but no
costs of appeal
given.

Waddilove, proctor for the appellant.

Clarkson & Co., proctors for the respondents.



In the High Court of Admiralty.

THE ELÉONORE.

Illegal Arrest—Salvage Services to Property of less Value than 1,000l.—Costs and Damages—Appearance under Protest—Reference to Registrar—17 & 18 Vict. c. 104, s. 468, and 25 & 26 Vict. c. 63, ss. 49, 50.

No general rule can be laid down as to condemning salvors in costs and damages for arresting in the Admiralty Court property of less total value than 1,000l. The fact that the arrest was made without verbal claim, and for a sum disproportionate to the value of the property and the services rendered, will be evidence that the arrest was made negligently.

If the Court has not in fact jurisdiction, a defendant is not prejudiced by an absolute appearance.

A reference to the Registrar as to damages will not be ordered, where the Court can satisfactorily dispose of the question.

THIS was a motion, on behalf of the owners of the French coasting schooner *Eléonore*, to condemn the owners of the steamship *Harkaway* in the damage and loss consequent upon the illegal arrest of the *Eléonore*, and also in costs, and to refer the damage and loss to the Registrar and Merchants. November 17.

The facts of the case were as follows:—

On the 11th of July, 1863, the *Eléonore* was lying in the old harbour at the port of Hull, and discharging her cargo along-

1863. side a quay. A fire broke out in the warehouse adjoining the premises where the cargo was being discharged, and the *Harkaway*, a steam vessel, dragged the *Eléonore* away from her berth, out of reach of the fire. On the 14th, the *Eléonore* was chartered by her master to load coals at Hull for La Rochelle; and on the following day began loading accordingly. On the 15th of July the owner of the *Harkaway*, without giving notice of any claim upon the master of the *Eléonore*, instituted a cause of salvage in the Admiralty Court against the *Eléonore*, her freight and cargo, in the sum of 800*l*. On the 16th, the *Eléonore* and her cargo were arrested by the plaintiffs. On the 18th the proctor for the owners of the *Eléonore* and her cargo put in an absolute appearance on their behalf, at the same time suggesting to the plaintiff's proctor, that the value of the property arrested was less than 1,000*l*. On the 22nd the defendant's proctor filed an affidavit, that the value of the vessel, freight and cargo amounted to 832*l*. 0*s*. 1*d*. On the 24th, the plaintiff's proctor consented to a release, and on the 25th the release issued, the vessel having thus been under arrest ten days. On the 27th of July, the *Eléonore* and her cargo were arrested by the receiver of wreck at the port of Hull, under the 468th section of the Merchant Shipping Act, 1854, and on the 17th of August the local stipendiary magistrate awarded to the owners of the *Harkaway* for the salvage services the sum of 10*l*.

The master of the ship averred in his affidavit, that he had been unable to procure bail during the arrest of the vessel in the Admiralty Court, and that the owners had lost 67*l*. 4*s*. by the detention; the above motion was now made on behalf of the defendants to condemn the plaintiffs in costs and damages from the date of the illegal arrest, and to refer the damages to the Registrar and Merchants.

The following statutes were cited in the argument:—

Merchant Shipping Act (17 & 18 Vict. c. 104), sect. 468, and the Amendment Act (25 & 26 Vict. c. 63), sects. 49, 50. The Principal Act, sect. 468, appoints that the receiver of wreck shall detain salved property until payment is made or process issued. The Amendment Act, sect. 49, takes away, as decided in the *William and John* (a), the jurisdiction of the Admiralty Court in all cases where the value of the property saved does not exceed 1,000*l*.; and sect. 50 provides that the receiver may, upon application of either of the parties (i. e. salvors or owners); appoint a valuer to value the property; a copy of the valuation to be given to both parties.

(a) Ante, p. 49.

Lushington in support of the motion.—1st. In all cases where the property arrested falls short of 1,000*l.* the salvors ought to be condemned in costs and damages. 1863. November 17.

2nd. The circumstances of this case show wilful abuse of the process of the Court.

Dr. *Spinks*, contra.—1st. There was no *mala fides* or *crassa negligentia*: *The Evangelismos* (a).

The plaintiffs corrected their mistake as soon as they found it out.

2nd. The defendants were guilty of laches:

(a) They did not put in an appearance under protest: *The Leda* (b).

(b) They did not apply to the receiver for a valuation.

DR. LUSHINGTON.—It is impossible to lay down a general Judgment. rule as to costs and damages applicable to all cases. Great injustice might be done if costs and damages were allowed in every case where a vessel, freight and cargo, after arrest, proved to be of less value than 1,000*l.* The Court must look to all the circumstances. In the present instance the arrest was for 800*l.*, and, as against this, it appears that the whole value of the vessel, freight and cargo amounts to no more than 832*l.* 0*s.* 1*d.*, and the real value of the salvage services has been estimated by the magistrate at only 10*l.* The Court views with disapprobation the entry of actions in grossly disproportionate amounts. Again, the plaintiffs arrested the vessel without having given notice of any claim to the master, who was the owner's agent in this country, and without taking any steps to ascertain her value. I think the arrest of the vessel under these circumstances, and for a sum of 800*l.*, was an act of *crassa negligentia* on the part of the plaintiffs. It is true that the plaintiffs withdrew from the action as soon as the value of the vessel was ascertained; but having initiated proceedings, they are responsible for the same. The fact that the appearance of the defendants was not under protest is immaterial; for, as soon as it is shown that the value of the property arrested is under 1,000*l.*, the Court ceases to have jurisdiction and must hold its hand.

The defendants are entitled to costs. As to damages, I might ascertain them exactly by referring them to the Registrar and Merchants; but to avoid expense, the Court, if it can satisfactorily dispose of the question, will refrain from ordering a refer-

(a) *Swabey*, Ad. 378.

(b) *Swabey*, Ad. 40.

1863. ence. I think 67*l.* an excessive claim for damages ; I award
November 17. 20*l.* in addition to the costs.

Dr. *Spinks* asked leave to appeal.

DR. LUSHINGTON :—I think leave is unnecessary, but I give leave.

Stokes, proctor for the plaintiffs.

Coote, proctor for the defendants.

THE EARL OF LEICESTER.

Collision—Practice as to which Party shall begin.

In a cause of collision, where the defendant admits in the pleadings that his ship when under way ran into a vessel at anchor, but denies that the vessel at anchor was the vessel of the plaintiff, the plaintiff must begin and prove his case.

November 20. THE plaintiffs, the owners of the brig *Shepherdess*, sued the brig *Earl of Leicester* for damages occasioned by collision. The petition charged that the *Earl of Leicester*, being under way, ran into the *Shepherdess*, when at anchor in Yarmouth Roads, on the night of the 21st of December, 1862. The answer of the defendants admitted that on the night in question the *Earl of Leicester* had accidentally ran into another vessel at anchor in Yarmouth Road, but denied that that vessel was the *Shepherdess*.

Dr. *Deane*, Q. C., and *Brett*, Q. C., for the plaintiffs.

J. Karlake, Q. C. and *Clarkson*, for the defendants.

Upon the case being called on for evidence and hearing,

Karlake submitted that the defendants ought not to be required to begin. The culpability of the vessel under way was not the only issue ; there was also an issue of disputed identity.

The test is, if there is no evidence, against whom would be the judgment of the Court.

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DR. LUSHINGTON.—The plaintiffs must establish identity; and they ought therefore to begin.

Stokes, proctor for the plaintiffs.

Clarkson, proctor for the defendants.

THE PYRENNEE.

Salvage—Apportionment between Ship and Cargo—Proceedings before Magistrates—17 & 18 Vict. c. 104, ss. 460, 468, 469.

Ship and cargo must each pay its own share of salvage: neither can be made liable for the salvage due from the other; whether the salvors proceed in the Admiralty Court, or before the local magistrates.

ON the 29th of January, 1863, salvage services were rendered to the Pyrennee and her cargo by the steam-tug *Reliance*, belonging to the New Steam Tug Company (Limited), of Liverpool. In February the master of the Pyrennee delivered the cargo and received from the owners the freight, and also a sum of 15*l.*, in full satisfaction of what was payable by the owners of the cargo as their proportionate share of the whole sum for which the master alleged he had compromised the claim of the salvors. The master then absconded. On the 23rd of March a cause of necessities was instituted by the plaintiff against the Pyrennee, and the vessel was arrested. On the 9th of April an award was made by two justices of the peace for the borough of Liverpool, awarding to the salvors 70*l.* for salvage services, to be apportioned between the parties by the receiver of wreck, and 3*l.* 3*s.* for costs, directing that, with regard to this last-mentioned sum, 2*l.* 8*s.* should be borne by the owners of the Pyrennee, and 15*s.* by the owners of her cargo. On the 2nd of May an appearance was entered in the cause of necessities on behalf of the salvors. The vessel was sold under order of the Court, and the net proceeds, amounting to 117*l.* 9*s.* 8*d.*, were in the registry. A motion was now made on behalf of the salvors for an order for

December 2.

1863. the payment to them of 73*l.* 3*s.* for salvage and costs given to
December 2. them by the award, and for their costs in this cause, against the
proceeds of the ship remaining in the registry, and against the
owners of the cargo.

Potter in support of the motion.—If the receiver of wreck had sold the ship before the institution of the suit, the salvors would have been paid out of the proceeds—17 & 18 Vict. c. 104, s. 469; and the owners of the ship would have been entitled to a general average contribution from the owners of cargo.

Clarkson for the plaintiff, the necessities man.—The cargo must bear its own salvage expenses; they cannot be thrown on the ship. If this order is made, nothing will be left for the necessities man, whose claim is against the ship alone.

DR. LUSHINGTON.—The application is most unreasonable; it prays the Court to order salvage to be paid by the ship alone, which ought to be paid out of ship, freight and cargo. I dismiss the motion with costs.

Pritchard, proctor for the salvors.

Crosse, proctor for the necessities man.



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THE LAUREL.

*Bottomry—Pleading—Lien under Local Law—Commissions—
Costs separable.*

A lien on the ship and freight, existing by local law, for advances and commissions, cannot convert a transaction on personal credit into a bottomry transaction, so as to render valid a bond subsequently given, or prevent the ordinary reference of the fairness of the commissions to the Registrar and Merchants.

The existence of such a local law may be properly pleaded as material evidence to support an allegation that the agreement was to make advances on the credit of the ship and freight, and that the commissions were customary.

The existence of such a law will be assumed by the Court, unless contradicted by plea. If contradicted, either party may produce evidence, the party failing in the particular issue to pay the costs of it.

THIS was a motion to strike out the 3rd article of the plaintiffs' reply.

The plaintiffs, Finlay, Hodgson & Co., in their petition, sued as holders of a bottomry bond dated the 13th December, 1862, given upon the ship Laurel and her freight, to Messrs. Maclaine, Watson & Co., of Batavia.

The defendants, John Willis & Son, in their answer, pleaded that the Laurel, being on a homeward voyage from China with a valuable cargo of tea and silk, was forced to put into Batavia to have the ship examined and repaired; that the master there consigned the ship to the firm of Maclaine, Watson & Co., who accepted the consignment and agreed to make the necessary advances on the personal credit of the owners, without bottomry; that, on the repairs being completed, Maclaine, Watson & Co. furnished the master with an account, which charged not only the amount of the disbursements, but also a commission of 2½ per cent. on the estimated or assumed value of the cargo, for the whole of which sum they required the master to give a draft on the defendants, and also the bottomry bond; that the amount of the disbursements was 1,328*l.* 6*s.*, and the amount of commissions charged 2,774*l.* 3*s.*; that no maritime premium was charged in the bond; and that, notwithstanding the form of the bond, the repayment of the advances was not dependent on sea risk.

The plaintiffs' reply denied the agreement alleged in the answer, and further pleaded:—

“3. By the law in force at Java and the island of Ormst, at such respective times and at the time when the said bond was given, the said Messrs. Maclaine, Watson & Co. were entitled

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to a lien on the Laurel and her freight for the several items included in the said bond, and the said Messrs. Maclaine, Watson & Co. were by such law entitled to enforce payment of such items by arrest and sale of the Laurel and arrest of her freight; and had not such bond been given, they would have proceeded so to enforce payment of such items.

“ 5. The commissions included in the said bond are the usual, lawful and customary commissions payable at Batavia in circumstances such as those of the present case.”

November 3.

Vernon Lushington in support of the motion.—The third article of the reply ought not to be allowed. The law of Java is immaterial to the issue raised in this case; which is, whether the advances were or were not made on personal credit. The agreement between the parties would operate as a waiver of any lien which the Java law might otherwise give. The plaintiffs here rely upon the Java law as giving a lien upon the ship and freight for all the items in the bond, including the exorbitant commissions, which is the real matter of dispute between the parties. But such commissions are never allowable in this Court, whatever may be the custom of the port where they are charged; *The Glenmanna* (a); and this Court has always refused to sustain a bottomry bond merely by the local law of lien. Thus, in the *Augusta* (b), Lord Stowell, in pronouncing against the bond, said, “ It has been said that the party might, by the law of Russia, have detained the ship till the money was repaid; but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation. Ships might in all cases be detained on the same ground by the general law of Europe; and if the position which has been laid down were to be supported, it would go the length of turning every case into a case of hypothecation, or at least there would be a necessity of inquiry, in every case, into the state of the foreign law.” So, in the *Aurora* (c), Mr. Justice Story said, “ It must be admitted that a bonâ fide creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other or sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended by the counsel for the appellants, that a mere threat to arrest the ship for a pre-existing debt would be a sufficient necessity to justify the master

(a) *Lushington*, 123

(b) 1 *Dodson*, 288.

(c) 1 *Wheaton*, Rep. 104.

in giving a bottomry interest, since it might be an idle threat, which the creditor might never enforce, and until enforced the peril would not act upon the ship." Here there was no arrest, nor even a threat of arrest. But in the *Osmanli* (a) this Court rejected a bond, by means of which the ship had been delivered from actual arrest, and intimated that the observations of Lord Campbell, in the *Prince George* (b), were extrajudicial, and did not overrule Lord Stowell's judgment in the *Augusta*. In other bottomry cases, and maritime cases generally, this Court enforces the law maritime, and that only: *The Bonaparte* (c); *The Eliza Cornish* (d); *Cammell v. Sewell* (e).

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E. C. Clarkson, contrà.—The commissions will be referred in the ordinary way to the Registrar; the question here is the validity of the bond, and whether the advances were made on personal credit or not. On that question the local law of lien has a most material bearing. In the *Vibilia* (f) your Lordship said, "I agree with Lord Stowell that the law giving a lien may not alone be sufficient for such conversion (i. e., conversion of a transaction originally one of personal credit into bottomry). But does it therefore follow that in a case of a totally different nature,—where money has not been proved to have been lent on personal security; where there is no question of conversion; where the question is, whether the advances were on personal security or not; I say, does it follow that in such a case, the fact of a lien existing by the law of the foreign state is no ingredient, no important circumstance in ascertaining the true nature of the transaction? I am of a contrary opinion, and so, I think, was Lord Stowell. When such is the state of the law, and where the question is personal credit or not, it is, in my opinion, most important to bear that law in mind, because it is a state of things rendering bottomry more probable; it furnishes a presumption in favour of bottomry and against personal credit; for why should a merchant, without some such consideration as that of bottomry, abandon the lien the law of his own country affords him, and trust to the credit of an owner in a foreign country, of whom, by the very case supposed, he knows nothing? Of this way of thinking, I conceive, was Lord Stowell, when he pronounced his judgment in the case of the *Alexander*" (g). And again, at page 13, after quoting the words of Lord Stowell in that case: "It is evident, that in the opinion of

(a) 3 Wm. Rob. 214.

(b) 4 Moore, P. C. C. 25.

(c) 3 Wm. Rob. 306.

(d) 1 Eccl. & Adm. Rep. 45.

(e) 3 H. & N. 617.

(f) 1 Wm. Rob. 7.

(g) 1 Dodson, 278.

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Lord Stowell, it is competent for the foreign merchant, without any express agreement for a bottomry bond, to make advances on the security of the ship; that is, upon the faith of a lien given by the law of his own country, and it is not necessary for him to have a bond of bottomry, or an agreement for such bond, until the ship is about to sail. This is the real substance of the case of the *Alexander*, and constitutes the important distinction between that case and the *Augusta*, which applies only to the conversion of an advance on personal security into a bottomry transaction." It is clear from this judgment that the law of lien in Java has a most important bearing on this case.

Lushington in reply.—The local law of lien may be used in support of a bond given for actual advances, and charges of a reasonable description, but not to support a bond like the present, the bulk of which consists of outrageous charges, called, in Java, commissions.

Cur. adv. vult.

November 10.
Judgment.

DR. LUSHINGTON.—The question I am about to discuss arises in a cause of bottomry, and on an objection to the 3rd article of the reply, a petition and answer having been previously filed.

The bond sued upon was executed at Batavia on the 13th of December, 1862. It states that the *Laurel*, a British ship, put into Batavia on a voyage from Shanghai to London; that the sum of 4,088*l.* 17*s.* 4*d.* was necessary to defray the expenses of the repairs and to enable the ship to prosecute her voyage, and that Messrs. Maclaine, Watson & Co. have advanced it.

The master then covenants that the vessel shall proceed on her voyage, and binds himself, the ship and freight, to pay the money aforesaid within thirty days *after safe arrival in London*; in the previous part of the bond it was stated that the master was forced to take up the money upon the adventure of the ship, as it further states that if the ship be lost the money shall not be recoverable.

There is no stipulation for maritime or any interest.

The ship and freight were arrested on the 9th of April, soon after her arrival in London, and bail was given.

April 21. Petition filed, and that petition merely states the execution of the bond and its contents.

The answer pleads many facts, which it is unnecessary in this stage of the cause to notice.

The 5th article, however, is important for the consideration of the present question; it pleads that the master consigned the vessel to Maclaine, Watson & Co., upon an agreement that they

should advance the necessary funds at $2\frac{1}{2}$ per cent., and 5 per cent. on the necessary disbursements, and made no stipulation as to bottomry.

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The 6th article pleads an account rendered, in which was charged $2\frac{1}{2}$ per cent. on the value of the cargo.

The accounts are annexed, and the 8th article pleads that the money was advanced on personal credit.

The account shows that a very large proportion of the money covered by the bond was for commission on discharging and reshipping the cargo, which, consisting of tea and silk, was very valuable.

The substance of this answer is, that the money was advanced on personal security and not on bottomry.

To this answer a reply is given in, and the averment that the money was lent on personal security and not on bottomry is met by the 4th article of the reply. That 4th article does not allege that the money was advanced or paid upon any provision or undertaking to have a bottomry bond, but it alleges that the money was advanced and the business done on the credit of the ship and freight.

I am not about to give any opinion upon the legal effect of this article if proved. It is open to the construction (whatever may be the legal consequences) that the money was advanced without any previous provision that a bottomry bond should be given. Such questions are for discussion hereafter, but I advert to this article because it is necessary to take a full view of this case to ascertain the true issue raised, which I apprehend to be that, admitting that there was no undertaking for a bottomry bond, the bond is valid, because the house that advanced the money did so upon the credit of the ship and freight.

Such being the state of the pleading, another and a different issue is raised by the 3rd article, the admissibility of which is the only question for present decision.

This article pleads the law of Java. That by that law, at the time of the advance and execution of the bond, Messrs. Mac-laine, Watson & Co. were entitled to a lien on the ship and freight for the several items included in the bond, and to enforce payment by arrest and sale of the vessel, and arrest of the freight.

Now, assuming the law to be as pleaded, it is manifest that its importance in this case is dependent upon another proposition; namely, that such power of arrest and sale renders a bottomry bond valid, though there was no prior, or indeed any, engagement for bottomry before the execution of the bond. If

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that be not the effect of the law as pleaded, I do not see how that law, if proved, can confer validity upon the bond.

I should observe that it is only where a bottomry bond would otherwise be invalid that there could be any necessity to revert to such law; that law is invoked to make that valid which would otherwise be invalid.

We all know that bottomry bonds can be granted only in cases of necessity, where the master has no personal credit. All the authorities declare that a bottomry bond granted where there is no necessity, or where there is personal credit, is invalid; and further, that a bond not executed till long after the actual advance, if in pursuance of an agreement for bottomry, is valid.

Now the Court, from the case of the *Augusta* to the cases up to the present day, has good reason to conclude that in almost all foreign countries, if not in all, merchants who supply money to defray the necessary expenses of the ship, tradesmen who do the necessary repairs or furnish the necessary articles, have a right of arresting the ship to satisfy their demand, if such right of arrest, per se, renders valid any bottomry bond, though there was no agreement or understanding that such bond would be required, it follows that under such circumstances in all cases a bond, and a valid bond, may be executed, though the master never made any such agreement—never contemplated the granting a bottomry bond, and, if he had suspected a bond would have been required, might have hesitated before he received such assistance—might have sought for it in other quarters, or in some cases have waited for instructions from owners or consignees. These are very serious considerations, which would make the Court pause before it gave its assent to such doctrine—still it may be that such state of the *lex loci*, though not perhaps sufficient to bring about all those consequences attributed to it, may be an important ingredient assisting to support the validity of the bond.

I now proceed to inquire how far these questions are affected by former decisions, but it is so desirable to be accurate, that I will again state the questions to be considered: the first is—Is a bottomry bond valid when there was no stipulation when or before the advances were made or responsibility incurred for the granting such bond, and if yea, under what circumstances?

The *Alexander (a)*, decided in 1812, is the first authority.

The report is brief, and the arguments of counsel are omitted; the side note is wholly silent as to the present point. I collect,

(a) 1 Dodson, 278.

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Nov. 8, 10.

however, that against the bond it had been contended that there was no promise that a bottomry bond should be taken, and that the advances were made on personal credit. I think the result of this case is, that Lord Stowell expressed an opinion that the validity of the bond depended, not only on a promise or undertaking to give the bond, but upon the question whether the merchant making the advances did so on the credit of the ship, and not on personal credit; and I think it is to be inferred that he also intimated his opinion that the conclusions of fact were to be drawn from all the circumstances of the case, the liability of the ship to be arrested being one of the circumstances to be considered.

The following is the most important part of his judgment:—
“But the question is, whether, so induced, they did not make these advances on the credit of the ship; against the proprietors of the cargo, they had no direct demand for repairs done to the ship; and as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself as their security. Some of the advances were made before the master was appointed, and these, it is said, could have had no reference to a bond of hypothecation. But what could they look to but the ship? For of the owners of the ship they had no knowledge. The bond was not, perhaps, noticed at first; because in Pernambuco, as in other foreign states, there is no necessity for an instrument of this kind; for, by the general maritime law, the vessel itself is ipso facto liable for repairs. There was no necessity, therefore, for having recourse to a bond till the ship was coming to this country, where, from peculiar motives of policy, a special hypothecation is required” (a).

I think that the effect of these observations is, that such lex is important as regards the intention to advance on the credit of the ship, but not conclusive that the lex loci alone would render a bond, otherwise void, valid.

If there be any doubt as to Lord Stowell's meaning, this passage must be taken in conjunction with his subsequent decision in the *Augusta* (b).

That case decided that, whatever advances had been made on personal credit, a bottomry bond for such advances would not be valid by reason of the law of the country where the bond was taken authorizing the detention of the vessel for such advances.

All the observations must be taken with reference to the circumstances of the case under discussion, and the principal fact was, that the money had already been advanced on personal security:

(a) p. 280.

(b) 1 Dodson, 283.

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as to the sum in dispute, there was no question as to whether it had been advanced upon the credit of the ship—beyond doubt it was not.

This case of the *Alexander* had been decided only about a year before, and it was cited for the argument. The observations of Lord Stowell, therefore, in the *Augusta* cannot, unless the contrary clearly appears, be construed as antagonistic to the judgment in the *Alexander*.

I think the effect of Lord Stowell's concluding observations in the *Augusta* is this:—that a law sanctioning arrest for advances will not convert a transaction on personal credit into a bottomry transaction; but such observations do not contradict the doctrine in the *Alexander*, that the existence of such a law, in the absence of proof that the advances were made on personal credit, supports the presumption that the advances were made upon the credit of the ship. Indeed this appears to me to be the leading consideration in Lord Stowell's mind—whether the advances were made on personal credit or on the security of the ship.

I know of no case which contradicts or militates against the law so explained; I think my own judgment in the *Vibilia* is in accordance with it. I therefore admit this article for the following purpose, because it is admissible evidence to show that the money was advanced on the security of the ship, the essence of a bottomry transaction; I do not admit it as converting a transaction on personal credit into bottomry.

With regard to the charge of commission being the customary charges, this is properly for the Registrar and Merchants, but for convenience sake I will not exclude it. I admit that such charges being customary is a fact to be considered in ascertaining if the charges are fair, not as conclusive evidence; for I have ruled, and declare again, that with respect to commissions the Court will not be bound by the custom of any place.

I think, under the explanations I have given, I am bound to admit the 3rd article; but I must take care to guard against the evil anticipated by Lord Stowell in the case of the *Augusta*, namely, the evil of inquiring into the state of the foreign law, and the expense and delay attendant thereon.

In the *Alexander* it does not appear that there was any evidence of the law prevailing at Pernambuco. Lord Stowell seems to have assumed it, as it was not contradicted, and is the law generally in force in foreign countries.

The course I shall pursue is this—I shall admit the article; if not contradicted by plea I shall assume it to be true, without

requiring evidence. If contradicted by plea both parties are at liberty to produce evidence. The party which fails on such an issue will have to pay the costs, whatever may be the ultimate result of this litigation.

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I wish it to be clearly understood that the judgment I have now given is to be strictly confined to the admissibility of the 3rd article, and is not to be construed as an opinion in any respect upon the general question of the validity of this bond, respecting which there are many circumstances, as the absence of maritime premium, and the fact of the draft being required, which of course will require consideration.

Toller & Sons, proctors for plaintiffs.

Cotterill & Sons, proctors for defendants.



In the Privy Council.

Present—LORD KINGSDOWN.

LORD CHELMSFORD.

RIGHT HON. SIR EDWARD RYAN.

RIGHT HON. SIR L. PEELE.

THE STETTIN.

Compulsory Pilotage—6 Geo. IV. c. 125, s. 59—17 & 18 Vict. c. 104, ss. 376, 379—“*Navigating within.*”

The words “*navigating within*,” in the 379th section of the Merchant Shipping Act (17 & 18 Vict. c. 104), mean *being within*; and therefore a vessel belonging to the port of London, and coming from a foreign port, is exempted from the employment of a licensed pilot in the river Thames.

Seem, that such a vessel is also exempted from compulsory pilotage by the 59th section of the General Pilotage Act (6 Geo. 4, c. 125).

COLLISION. In the Court of Admiralty an action was brought by the owners of the brig *Thorneley* against the *Stettin* for a collision which took place off the Regent’s Canal in the river Thames. The *Stettin* belonged to the port of London, and was inward bound from Bordeaux: at the time of the accident she was being navigated by a duly licensed pilot.

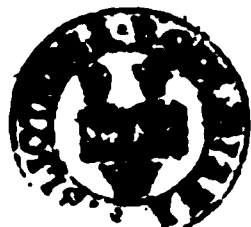
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On the hearing of the cause the Court found that the accident was occasioned by the default of the pilot of the Stettin; the question was afterwards argued whether the employment of the pilot by the Stettin was compulsory by law.

The following sections of the "Merchant Shipping Act, 1854," (17 & 18 Vict. c. 104) were referred to.



Sect. 376. "Subject to any alteration to be made by the Trinity House and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London District and the Trinity House Outport Districts, as hereinbefore defined, &c.

Sect. 379. "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district and in the Trinity House outport districts, that is to say,

* * * * *

(5) Ships navigating within the limits of the port to which they belong."

Also the 59th section of the Act 6 Geo. IV. c. 125.

"Provided always, and be it further enacted, that for and notwithstanding anything in this act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either (a) by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burden of sixty tons, and having a British register, except as hereinafter provided, *or of any other ship or vessel whatever whilst the same is within the limits of the port or place to which she belongs*, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel."

(a) *Sic.*

The *Admiralty Advocate* (Dr. Phillimore, Q.C.) and *Vernon Lushington* for the plaintiffs.—The employment of the pilot was not compulsory. This collision took place in the port of London and in the “London district,” as defined by the 370th section of the Merchant Shipping Act. We admit that by the 376th section the employment of a pilot is generally compulsory upon ships there navigating; but as the *Stettin* belonged to the port of London, we contend that she came within the exemption stated in sect. 379: “ships navigating within the limits of the port to which they belong.” “Navigating” is a large general word; it is used likewise in sect. 297. The exception seems to be repeated in another form from the 59th section of 6 Geo. IV. c. 125, where the expression is “whilst the ship is within, &c.” It is not unreasonable that a master should be competent to conduct his ship without the assistance of a pilot in the port to which she belongs. [Dr. *Lushington*.—Ships belonging to the port of London go to every part of the world, and sometimes do not visit London for years.] No doubt: but in many cases they return to their own port continually, as for instance, vessels regularly trading between London and Bordeaux. But at any rate the *Stettin* was within the exemption given by sect. 59 of 6 Geo. IV. c. 125, which the Privy Council has determined to be maintained by the 353rd section of the Merchant Shipping Act: *Earl of Auckland* (a).

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Dr. *Twiss*, Q.C. and *E. C. Clarkson*, contra.—The employment of the pilot was compulsory by sect. 376 of the Merchant Shipping Act. The *Stettin* was not within the exemption in sect. 379: “navigating within” means “not navigating without:” and reason is in favour of this construction, for vessels which navigate only within the limits of the port to which they belong need no pilot, but it is otherwise of vessels which go on long and distant voyages, and return only at intervals to their own port. This meaning of “navigating within” in sect. 379 shows that the word “is” in the statute of Geo. IV. means “is constantly;” even if the earlier statute is not directly limited by the later. The decision in the *Earl of Auckland*, though affirming that the 59th section of 6 Geo. IV. c. 125, is maintained by the 353rd section of the Merchant Shipping Act, did not turn on this particular exemption.

On the 24th of June, 1862, Dr. LUSHINGTON gave judgment. The Court has found that this collision was occasioned by the Judgment.

(a) *Lushington*, 387.

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default of the licensed pilot in charge of the Stettin. The Stettin belongs to the port of London, and the collision took place within the London district, which is defined by the 370th section of the Merchant Shipping Act; and the question is, was the employment of the pilot in these circumstances compulsory by law?

By the 376th section of the Act the taking of a licensed pilot in the London Trinity House district is generally compulsory. By the 379th section there are exemptions from this obligation, among which is the following: "ships navigating within the limits of the port to which they belong." This ship belonged to the port of London, and the collision took place within that port: then was the ship "*navigating within the limits of the port*"?

This exemption cannot have been purely arbitrary; it must be founded upon some reason. Is that reason the simple fact of belonging to the port as affording such a knowledge of the navigation of that port, that the employment of a pilot may be safely dispensed with? The fact of belonging to the port, I admit, gives some colour to this alleged presumption of knowledge, but when the matter comes to be examined, the presumption, I think, almost entirely vanishes. Ships belonging to the port of London are engaged in every description of voyage; very many of them do not for years enter the port, and it is contrary to probability that the masters or officers should possess adequate knowledge of the navigation of the port. So viewed, the fact of the ship being registered in the port becomes, I think, no sufficient reason for the exemption.

Then consider the other construction, that "navigating within the limits of the port" means navigation confined to those limits. This construction is more consonant with reason; for those engaged in such navigation must acquire adequate local knowledge and experience. It is, too, a construction that accords best with the words themselves, for although the word "navigating" alone might be open to either construction, yet, coupled with the word "within," it would appear to negative voyages beyond the limits of the port. If this case rested solely on the Merchant Shipping Act, I should hold, though with much doubt, that the taking the pilot was compulsory, as the vessel came from a foreign port; but it has been urged that an exemption from compulsory pilotage applicable to this vessel is to be found in the General Pilot Act (6 Geo. IV. c. 125), and that all such exemptions are continued by the Merchant Shipping Act. Now after the case of the *Queen v. Stanton* (a), and the judgment in the *Earl of*

(a) 8 E. & B. 445.

Auckland, affirmed on appeal to the Privy Council (*a*), I must assume that the exemptions in the General Pilot Act are continued by sect. 353 of the Merchant Shipping Act. The question, therefore, is, whether this vessel was exempted by the 59th section of the General Pilot Act.

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The words applicable to this question are these :—The master of any ship or vessel whatever, while the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any Act of Parliament, or by any charter or charters, for the appointment of pilots, “may lawfully conduct the same, provided he do not employ an unlicensed pilot.” These words are very different from those of the 379th section of the Merchant Shipping Act, and I feel, therefore, compelled to put a different construction upon them. I think that, by the 59th section of the General Pilot Act, this vessel was exempted from compulsory pilotage and that she is consequently liable for the damage.

On appeal to the Privy Council, on the 23rd July, 1863, the question was argued by the *Admiralty Advocate* (Dr. *Twiss*, Q. C.) and *E. C. Clarkson*, for the appellants.

The *Queen's Advocate* (Sir *R. Phillimore*, Q. C.) and *V. Lushington*, for the respondents, were not called upon.

LORD CHELMSFORD, in delivering the decision of the Committee, said they were of opinion that the *Stettin* came within the exemption in the 379th section of the Merchant Shipping Act, and the words “ships navigating within the limits of the port to which they belong” must be taken to mean vessels “being within” those limits; that without expressing any opinion upon the construction put on the General Pilot Act by the Court of Admiralty, the Committee must affirm the decision of the Court below and dismiss the appeal with costs.

Clarkson, Son & Cooper, proctors for the appellants.

Sewell, Sewell & Edwards, solicitors for the respondents.

(*a*) *Lushington*, 164, 387.

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July 31.*In the Privy Council.**Present*—LORD WENSLEYDALE.

LORD CHELMSFORD.

LORD KINGSDOWN.

THE FALKLAND.
THE NAVIGATOR.*Collision—Rules of Navigation—Wearing—Tacking.*

When a vessel is sailing upon a wind, and passes from one tack to another, the usual mode of effecting this change is by tacking and not by wearing; as vessels which are navigating near the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual, and therefore unexpected, operation of wearing ought not to be resorted to, unless for some good reason, nor without sufficient sea room for the purpose.

The Court of Appeal, though reluctant to disturb the judgment of the Admiralty Court on a question of seamanship, will not shrink from doing so if satisfied by the advice of their nautical assessors that the decision of the Court below was erroneous.

THESE were cross actions brought by the owners of the Falkland and the Navigator in respect of a collision which took place between those vessels off the Dungeness Roads on the morning of the 6th February, 1863.

The causes were heard on the 19th March, when the learned Judge of the Admiralty Court, assisted by the Trinity Masters, found that the Falkland was solely to blame for the collision. From this decision the owners of the Falkland appealed. The circumstances of the case are fully stated in their Lordships' judgment.

Brett, Q.C., and Potter, for the owners of the Falkland.

The Admiralty Advocate (Dr. Twiss, Q.C.) and E. C. Clarkson, for the owners of the Navigator.

On the 31st July, LORD CHELMSFORD delivered the judgment of the Committee.

Judgment.

The questions upon these appeals from decrees or sentences of the learned Judge of the Court of Admiralty do not involve any dispute upon facts, but require the application of nautical skill

and experience to determine to which of the two vessels the blame of the collision is attributable.

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The facts may be shortly stated.

The Navigator, an American barque, and the Falkland, a British ship, about five o'clock in the morning of the 6th February, 1863, were off Dungeness. The wind was west, and the morning thick and hazy. Both vessels carried the usual lights. The Navigator was proceeding down Channel on the port tack, close-hauled under two double-reefed topsails and foretopmast staysail. The Falkland was following the Navigator at the distance of about three quarters of a mile on her starboard quarter, also close-hauled on the port tack, under topsails, jib, foretopmast staysail and spanker. The Navigator intending to change from the port to the starboard tack, instead of going about in the usual way by tacking, put her helm a-port, and commenced wearing round. While in the act of wearing, the Falkland was, for the first time, seen from on board the Navigator, her red light appearing about two points on the Navigator's starboard bow, the green light of the Navigator becoming visible to those on board of the Falkland.

The Navigator, in order to complete the operation of wearing, continued her port helm. The Falkland, still upon the port tack, kept her wind until shortly before the collision, when her helm was put down for the purpose of diminishing the force of the expected blow. The Navigator, as she approached the Falkland, put her helm hard a-port, and ran stem on into the Falkland's starboard bow, leaving there her billet-head and part of her cutwater. Cross suits were instituted in the Court of Admiralty by the owners of the respective vessels for the injuries they had both sustained by the collision. On the part of the Navigator it was insisted that the Falkland was alone to blame for not having ported her helm, by which (it was said) the collision might have been avoided. It was contended, on behalf of the Falkland, that the Navigator, before she attempted to go about, ought to have ascertained that there was room for her to wear a-head of the Falkland, and that when she found that this could not be done, she was bound to go astern, and that she could not force the Falkland to port her helm, and in effect to wear round also.

The learned Judge of the Court of Admiralty, with the assistance of the Elder Brethren of the Trinity House, held that the Falkland was solely to blame; that those on board of her were well aware that the Navigator was wearing, and ought to have ported in time, and not starboarded; and that no blame attached to the Navigator, and he dismissed the suit of the Falkland

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Grounds on which the Court of Appeal will reverse a judgment in the Admiralty Court upon a question of seamanship.

against the Navigator with costs; and in the suit by the Navigator against the Falkland, he pronounced for the damage proceeded for, and condemned the defendants in costs. From both these decrees the owners of the Falkland appealed. On the hearing of the appeals their Lordships had the usual advice and assistance which they require in all cases where nautical knowledge is necessary to enable them to arrive at a satisfactory determination.

It would have been a great satisfaction to them if their nautical assessors had agreed with the Trinity Masters, by whose skill and judgment the learned Judge of the Court of Admiralty was guided; but unfortunately there is a complete difference of opinion between them. The difficulty which this conflict of opinion throws upon the Committee in cases like the present, which require technical knowledge for their correct decision, has been often felt, and was acknowledged in the case of the *Julia* (a), to which reference has been made more than once during the present sitting. Undoubtedly their Lordships did not mean by their observations in that case to express a determination never to disturb a judgment in the Admiralty Court which was founded upon a question of seamanship, but merely (as was stated in the case of the *Minnehaha* (b)) that they would always feel extreme reluctance in reversing a decision the propriety of which depended upon the correctness of the judgment formed by persons of nautical skill and experience. But if aided by technical knowledge and experience of equal authority their Lordships are satisfied that the view taken in the Court below is erroneous, they cannot shrink from the duty of acting upon their own judgment, thus informed and enlightened, without abandoning their functions as an appellate tribunal in all cases of this description. In the observations which follow, their Lordships must be understood as expressing their own conclusions, derived from the advice of their nautical assessors, and the reasons which have induced them to adopt their opinions in preference to those of the Trinity Masters in the Court below.

The first matter to be considered is the manœuvre of the Navigator in wearing round. When a vessel is sailing upon a wind and passes from one tack to another, the usual and ordinary mode of effecting this change is by tacking and not by wearing. As vessels which are navigating near to the one which is changing her tack naturally expect that the ordinary method of going about will be pursued, the unusual, and therefore unexpected, operation of wearing ought not to be resorted to,

(a) Lushington, 224.

(b) Lushington, 335, 353.

unless for some good reason, nor without sufficient sea room for the purpose.

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The learned Judge of the Court of Admiralty put it to the Trinity Masters to determine why the Navigator wore instead of tacking, to which it does not appear that they gave any answer. In the printed case of the Navigator, it is stated, "that the weather having cleared up, vessels at anchor in Dungeness Roads could be seen, and it was deemed prudent to wear the barque from the port to the starboard tack." The approach of the Navigator near to the vessels in the Dungeness Roads may have been a good reason for her going about, but affords no explanation of the preference of wearing to tacking. But it is evident that the sails which the Navigator was carrying were not sufficient to keep her under command, and there can be no doubt that she wore because she was unable to stay for want of a proper amount of canvas. She was certainly at liberty to wear or to stay if there was no impediment to either course, but before she decided upon wearing she ought to have been sure that there was room to perform that evolution. Now, before she wore it is quite certain that the Navigator had never seen the Falkland at all, although the Falkland had seen the Navigator. The course of wearing was therefore adopted without reasonable and proper precaution. But assuming that wearing instead of tacking was a justifiable course for the Navigator to pursue there could be no good reason for her perseverance in it, and her determination to complete the circuit to the other tack, when she found the Falkland in her way. Having in the act of wearing observed the light of the Falkland about two points on her starboard bow, it was the duty of the Navigator to pass to leeward, and not to attempt to cross the Falkland's bows. At the time when the Navigator first saw the Falkland on her starboard bow her head was about south-east, and the wind being west she was going free, and was bound to give way to a vessel close-hauled as the Falkland was. With respect to the Falkland, although she saw the Navigator in the act of wearing, there was nothing to indicate to her that the Navigator was merely changing her tack, but the act of wearing itself might reasonably lead to the belief that she was intending to bear away up Channel. At all events when the Falkland saw a vessel with the wind free coming towards her, she was perfectly right in acting upon the well-known rule and keeping her tack instead of giving way by porting her helm. And when a collision appeared inevitable she was quite right in starboarding her helm at the last moment in order to diminish the force of the coming blow.

For these reasons their Lordships cannot concur in the judg-

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ment of the learned Judge of the Court of Admiralty, but they must recommend to Her Majesty to reverse the decrees in both suits, and in the suit of the Falkland against the Navigator to pronounce for the damage proceeded for, but in both suits without costs of the appeal on either side.

Pritchard & Sons, proctors for the Falkland.

Clarkson, Son & Cooper, proctors for the Navigator.



THE PRIDE OF CANADA.

Seamen—Waiver of Salvage—Agreement—Apportionment—
17 & 18 Vict. c. 104, s. 182—25 & 26 Vict. c. 63, s. 18.

In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage services, nor the stipulation that the seaman shall waive his claim for salvage, need be in writing to satisfy the 18th section of "The Merchant Shipping Amendment Act, 1862," but both must be clearly proved by those who dispute the seaman's right.

November 10. **T**HIS was a motion for an apportionment of salvage on behalf of some of the crew of two steam-tugs.

The suit was originally instituted by the United Steam-tug Company, as the owners of two steam-tugs, the Brother Jonathan and the United States, against the Pride of Canada, for salvage. The Court found that no danger to the lives of the crews of the steam-tugs had been incurred in rendering the service, and awarded a lump sum of 1,000*l*. Certain of the crew then gave notice of motion for an apportionment of the salvage. Thereupon the manager of the United Steam-tug Company filed an affidavit to the following effect:—That the steam-tugs were built and the crews engaged by the company for the express purpose of rendering towage and salvage services, and for no other purpose; that the crews were engaged to work the tugs at weekly wages, paid to them whether services were actually rendered or not; that in the present case the service was rendered by the crews of the steam-tugs under their ordinary engagement with the company; that the company had frequently had to sue for salvage, but that the men had never claimed to participate therein, though as a matter of free bounty and by way of en-

couragement, the company had often given small sums to the crew after salvage service had been rendered, and indeed had done so in the present instance; that the working expenses of the steam-tugs were about 140*l.* per week, besides wear and tear; that the steam-tugs were uninsured, and uninsurable on account of the risks; that on many days they would go out and meet with no employment at all; and, consequently, if the crew were entitled to share in salvage as if engaged in an extraordinary service the company could not go on.

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The seamen filed an affidavit in answer, denying that they ever made any agreement in writing or otherwise to perform salvage services at weekly wages without participating in the award, and alleging that they were engaged in the usual way to work the tugs in their ordinary employment of towing ships in and out of harbour, and not specifically to render salvage services without further remuneration.

The question turned upon the following sections of the Merchant Shipping Acts :—

17 & 18 Vict. c. 104, s. 182. “Every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage shall be wholly inoperative.”

25 & 26 Vict. c. 63, s. 18. “It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.”

Dr. *Deane*, Q.C., in support of the motion.—There is no stipulation within the terms of the statute: *Enchantress* (a); *Spirit of the Age* (b).

Brett, Q. C., and *E. C. Clarkson*, contra.—Steam-tugs are not sea-going ships, and consequently the provisions of the 182nd section of the principal Act are not applicable to them. Here there was an agreement that the tugs were to be employed on salvage services, within the terms of the 18th section of the Amendment Act, and the agreement is binding though not in writing.

DR. LUSHINGTON.—Looking to the terms of the statute, I do not think the agreement or stipulation need be in writing; but

Judgment.

(a) Lushington, 93.

(b) Swabey, 209.

1863. it falls upon those who dispute the seamen's claim to salvage to
November 10. show that there was an agreement that the vessel was to be employed on salvage service, and a stipulation that the seamen should waive their right to salvage money. Neither of these have been shown clearly by the company, and both are denied by the affidavit of the seamen. I must, therefore, pronounce for an apportionment. Of the 1,000*l.* awarded I give 750*l.* to the owners, 250*l.* to the masters and crews, each of the two masters to take 30*l.*, the seamen to take according to their rating, or to any agreement they may have entered into. The company must pay the costs of this motion.

Nethersole & Speechley, solicitors for the company.

C. Maddock, solicitor for the seamen.

Tebbs & Sons, proctors for the *Pride of Canada*.



THE EUROPA.

Collision—Limitation of Liability—Proceedings in Rem—Possession Fees—Interest.

A British ship having been arrested for a collision which took place before the passing of the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), was left under arrest in charge of the Admiralty marshal. Upon the cause being determined in favour of the plaintiffs, the ship was sold by order of the Court :—

Held, that the plaintiffs were only entitled to the nett proceeds of the ship (i. e. the gross proceeds, less possession fees and marshal's charges), together with costs of suit and interest ; the amount of interest to be referred to the Registrar.

December 1.

ON the 13th December, 1859, a collision took place at sea between the *Europa* and the *Integrity*, whereby the *Integrity* was sunk. The owners of the *Integrity* were unable to arrest the *Europa* until the 14th January, 1863. The defendants, the then owners of the *Europa*, did not give bail and the vessel remained at Liverpool under arrest pending the litigation.

On the 13th May the plaintiffs obtained the judgment of the Court, declaring the defendants liable for the damage proceeded for, and ordering a reference of the amount to the Registrar and Merchants.

The marshal appraised the Europa at 800*l*. The defendants appealed to the Judicial Committee, but the appeal was dismissed, and the cause remitted to the Court. The Court thereupon ordered the Europa to be sold, and the gross proceeds of the sale amounted to 960*l*.; and after deducting 134*l*. 19*s*. 1*d*. for the marshal's fees and disbursements, there remained in the registry as nett proceeds 825*l*. 0*s*. 11*d*.

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The defendants then filed an admission that the amount of the plaintiff's loss exceeded the sum of the gross proceeds of the Europa, and the plaintiffs now moved the Court to pronounce the sum of 960*l*., the amount of the gross proceeds, together with interest thereon from the 14th January, 1863, to be due to the plaintiffs in discharge of their claim for damage; to order the sum of 825*l*. 0*s*. 11*d*., the nett proceeds remaining in the registry, to be paid out to the plaintiffs in part discharge of their claim, and to condemn the defendants in the sum of 134*l*. 19*s*. 1*d*. (the residue of the said gross proceeds) and in the said interest.

By the 504th section of the 17 & 18 Vict. c. 104, the liability of the owners of the vessel found to blame for a collision is limited to the extent of the value of the vessel and her freight due or to grow due during the voyage when the casualty happened.

Milward and *Pritchard* in support of the motion.—The value of the ship to which the plaintiffs are entitled under the Act means her value at the time of the collision; *Brown v. Wilkinson* (a); and that value cannot be less than the gross proceeds arising from the sale three years afterwards. Moreover the deductions claimed by the defendants on account of the marshal's charges are expenses which would have been avoided if the defendants had not improperly defended the action, and ought to be costs in the cause. In addition to these gross proceeds the plaintiffs are entitled to interest as from the date of the arrest of the vessel; *The Dundee* (b); and to costs: *The John Dunn* (c).

Potter, contra.—The sum produced by the sale of the vessel is more than she would have produced if sold at the date of the collision when the state of the market was different. In an action in rem the practice is for the marshal's charges to be paid out of the proceeds. Interest is not at any rate due after the money was paid into Court in August: *North American* (d).

(a) 15 M. & W. 391.

(b) 1 Hag. 109.

(c) 1 W. Rob. 159.

(d) Lushington, 81.

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Judgment.

DR. LUSHINGTON—This is an action in rem: and in an action in rem it has never yet been contended that the plaintiffs are entitled to more than the price fetched by the sale of the vessel under the order of the Court. But from this the defendants are entitled to deduct the marshal's charges; and I say this without considering whether, in the circumstances of this case, the defendants were justified in defending the action. The plaintiffs might have saved these expenses if they had applied at once to have the vessel sold. The plaintiffs are also entitled to their costs of the cause, and to interest; but the question of interest I leave to the Registrar to settle in the ordinary manner. I give no costs of this motion.

Pritchard & Sons, proctors for the plaintiffs.

Tebbs & Sons, proctors for the defendants.



THE CHIEFTAIN.

Master's Wages—Laches—Release of Owner not release of Ship
—*Secret Liens*—4 Anne, c. 16, s. 17—17 & 18 Vict. c. 104,
s. 191.

A master does not lose his lien upon a ship for wages due by delaying to enforce such lien for ten months after his discharge, notwithstanding he has had an opportunity to do so; but he may enforce it even against persons who, as mortgagees, have in the interim become interested in the ship without notice of the lien.

Semble, by operation of 4 Anne, c. 16, s. 17, and the 191st section of the Merchant Shipping Act (17 & 18 Vict. c. 104), the master of a ship has, like other seamen, six years to bring his suit for wages in the Admiralty Court.

The release by the master of his personal claim against the shipowner for wages does not operate as a release of the ship from his lien for such wages.

December 8.

THIS was a cause of wages instituted by Captain Mac Millan, the master of the Chieftain, against the vessel; the Thames Graving Dock Company (Limited), mortgagees of the vessel, appeared and gave bail.

The petition stated that in March, 1855, the plaintiff was engaged as master by Donald Mac Larty, sen., then sole owner of the Chieftain; that in August, 1860, an account was duly settled between the plaintiff and the owners of the vessel, and a balance

of 39*l.* 5*s.* 10*d.* found due to the plaintiff; that on the 29th of April, 1862, the plaintiff was discharged at his own request, and that there was due to him 270*l.* 3*s.* 11*d.* 1863.
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The defendants, the Thames Graving Dock Company, put in an answer to the following effect:—

On the 9th November, 1856, Donald MacLarty, sen., then sole owner of the vessel, mortgaged her to Alexander Roger. On the 16th April, 1862, Roger, by execution of the power of sale contained in the mortgage deed, transferred the ship to Donald MacLarty, jun., and the bill of sale was registered on the 17th May, 1862. On the 16th May, 1862, Donald MacLarty, jun., mortgaged the ship to J. Alexander and Philip Vanderbyl, and the mortgage was duly registered. On the 17th December, 1862, the solicitors for Alexander Roger received a letter from the plaintiff's attorney in the following terms:—

“ 4, Corbet Court, Gracechurch Street, London,

“ Dear Sir,

“ 13th Dec., 1862.

“ Acting under a power of attorney from Captain Mac Millan, late of the barque Chieftain, I hereby discharge Donald MacLarty, sen., from all personal claims which the said Captain Mac Millan may have against him in respect of wages due while captain of the said ship.

“ Yours truly,

“ H^y. W^m. M^c R^{ath}.”

On the 21st January, 1863, Donald MacLarty, jun., further mortgaged the ship to the defendants, the Thames Graving Dock Company (Limited), to secure their claim for repairs, and the said mortgage was duly registered on the 3rd February by the defendants, without notice of any outstanding claim of the plaintiff against the ship.

On the 14th February the plaintiff instituted this cause, and arrested the ship. The ship being of value enough to meet the claim of the plaintiff, and also the claim of Messrs. Alexander & Philip Vanderbyl, the first mortgagees, the defendants (the second mortgagees), as being the parties truly interested in defending the claim of the plaintiff, entered an appearance and gave bail. The answer then pleaded; first, that the plaintiff, by reason of his laches in not enforcing his claim until the 14th February, 1863, though having had many opportunities so to do, after his discharge, was not entitled to enforce his lien to the prejudice of the defendants' subsequent incumbrances taken without notice; secondly, that the release to Donald MacLarty, sen., operated as a release of the ship, or at all events estopped

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the plaintiff from suing the ship to the prejudice of the defendants' subsequent incumbrances taken without notice.

The plaintiff now moved to oppose the admission of the answer.

E. C. Clarkson in support of the motion.—The lapse of time is no bar. By the 17th section of the 4 Anne, c. 16, a term of six years is named as the limit within which a claim for seaman's wages must be made. And by the 191st section of the Merchant Shipping Act, master and seamen are put upon the same footing.

Sect. 191. "Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which by this act or by any law or custom any seaman, not being a master, has for the recovery of his wages."

Maritime liens are good against purchasers or mortgagees: *Nymphe* (a); *Royal Arch* (b); *Bold Buccleugh* (c).

The master has two quite distinct remedies; one against the owners of the ship, the other against the ship; the release of the owner is not a release of the ship: *Bold Buccleugh* (d); *Nelson v. Couch* (e).

The defendants represent the ship: to oust the claim of the plaintiff, the answer should allege that not only they, but also the prior mortgagees, had no notice of the plaintiff's lien.

Vernon Lushington, contra.—The statute of Anne did not originally apply to masters, for masters had then only a personal remedy; nor does it now apply by virtue of the 191st section of the Merchant Shipping Act, because of the limitation in that section, "so far as the case permits." The master may often be in a different position from the seamen in respect of a claim for wages, as when the master has signed a bottomry bond: *The Salacia* (f); *Jonathan Goodhue* (g). The Merchant Shipping Act, s. 187, compels owners to pay seamen promptly on discharge.

The policy of the law is against secret liens, which must be enforced with despatch or not at all: *Bold Buccleugh* (c); *The Europa* (h); *The Alexander* (i). And a party should lose a maritime lien by unfairly giving up a personal security, just as

(a) Swabey, 86.

(b) Swabey, 284.

(c) 7 Moore, P. C. C. 285.

(d) 7 Moore, P. C. C. 281.

(e) 15 C. B. (N.S.) 99.

(f) Lushington, 545.

(g) Swabey, 526.

(h) Ante, p. 89.

(i) 1 W. Rob. 294.

by taking a personal security, as a bill, he is held to give up his lien: *William Money* (a). The master is really proceeding contrary to equity.

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DR. LUSHINGTON.—I do not think that the words “so far as the case permits,” in the 191st section of the Merchant Shipping Act, prevent the operation of the statute of Anne; but I do not pronounce any positive opinion on this point. In the present instance, the lapse of ten months cannot be held a bar. The claim of the master cannot be fairly termed a stale claim. Nor can the personal release of the owner (even if sufficiently pleaded) be taken to operate a release of the ship from the lien of the master. This answer is no answer, and must be rejected.

Waddilove, proctor for the plaintiff.

Cotterill & Sons, solicitors for the defendants.

THE OCTAVIE.

Foreign Vessel—Wages—Protest of Foreign Consul—Admiralty Court Rules, 1859, No. 10—24 Vict. c. 10, s. 10.

The protest by a foreign Consul against the continuance of a wages cause against a foreign vessel does not deprive the Court of jurisdiction; but the Court will use its discretion whether or not to exercise its jurisdiction.

Upon the Belgian Consul protesting on the ground “that, in his opinion, the cause ought to be settled by Belgian Courts of Law,” and the ship being laden ready for a voyage to Ostend, the Court dismissed the suit of the Belgian master.

ON the 17th November, 1863, a cause was instituted against the *Octavie*, a Belgian vessel belonging to the port of Ostend, but then lying at Liverpool, by her master for his wages and disbursements, and the vessel was arrested. On the same day due notice was given to the Belgian Consul in London, in accordance with the 10th of the Admiralty Court Rules, 1859, which prescribes that “in a wages cause against a foreign vessel notice of the institution of the cause shall be given to the Consul of the state to which the vessel belongs, if there be one resident in London; and a copy of the notice shall be annexed to the affidavit.”

(a) 2 Hagg. 136.

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An appearance was then put in on behalf of Nicholas J. Denduyts, as Belgian Vice-Consul at Liverpool, but he was the brother of the owner of the vessel and also his agent. The facts undisputed in the case were, that the plaintiff had brought the vessel from Glasgow to Liverpool, had then shipped a cargo on board for Ostend (the home port), and had signed the bill of lading for the same, and that at the moment of arrest the vessel was about to sail. But the plaintiff's account of the matter was as follows:—that whilst the vessel was at Glasgow, Nicholas J. Denduyts, as agent for the owner, wrote to the plaintiff telling him he was no longer to act as master; that he, plaintiff, thereupon wrote to the owner in Belgium to the effect that he would give up the command of the vessel as soon as his account, which was enclosed, should be paid; that the owner then wrote to his agents at Glasgow directions that the plaintiff was to bring the vessel to Liverpool, and should there be paid off; and that, if necessary for this purpose, the vessel should be sold; that the plaintiff signed the bill of lading under compulsion of Nicholas J. Denduyts, who, as Belgian Vice-Consul, refused to give up the ship's papers unless the plaintiff signed the bill; that the vessel was insufficiently manned and totally unseaworthy; that the owner of the vessel was in difficulties and insolvent; and that the plaintiff, being unable to obtain his money, had been compelled to arrest the vessel.

On the other hand, Nicholas J. Denduyts in his affidavit asserted that the plaintiff was under an implied agreement to navigate the vessel back to Belgium; that he had not been subjected to any compulsion; that the vessel was not unfit to proceed to sea; that by the Belgian law the plaintiff had a lien upon the ship and freight for his wages and disbursements, and that this lien the plaintiff would have an opportunity of immediately enforcing, because the vessel was bound to Ostend; that he, Nicholas J. Denduyts, had received a notice from one of the creditors of the plaintiff not to pay anything to the plaintiff, and that the cargo, since it had been shipped, had been sold to a purchaser at Louvain, and that if any delay took place the navigation from Ostend to Louvain would probably be closed by ice; and under these circumstances Nicholas J. Denduyts, as Belgian Vice-Consul at Liverpool and as agent of the owner of the vessel, protested against the arrest of the vessel or the prosecution of the claim for wages in the Admiralty Court. On the 5th December a protest was made by the Belgian Consul resident in London, by an affidavit simply stating "that, in his opinion, the cause should be settled by the Belgian Courts of Law."

Milward now moved on behalf of Nicholas J. Denduyts to dismiss the cause.

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Vernon Lushington, contrà.—The Court has jurisdiction, and will exercise it, unless reasonable grounds to the contrary are shown by the foreign Consul. In the *Herzogin Marie* (a), the master had been guilty of illegal conduct. By the 10th section of the Admiralty Court Act, 1861, the Court has jurisdiction over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship. “Any ship” must (like the same words in the 7th and other sections of the same Act) include a foreign ship: *The Courier* (b).

Milward, in reply, referred to *Franz et Elise* (c).

DR. LUSHINGTON.—The Court has jurisdiction, but whether Judgment. or not it will exercise that jurisdiction is a matter of discretion. The ancient practice was that, without the express consent of the foreign Consul, the Court would not exercise jurisdiction; but, for convenience sake, I established the practice of requiring a notice to be served on the Consul, allowing the cause to proceed as of course if no protest be made. In the present instance, the representation of Nicholas J. Denduyts would not be sufficient to induce the Court to hold its hand; for though Belgian Vice-Consul at Liverpool, he is not independent, being the owner’s brother and agent. But the Belgian Consul here in London has also protested, and I do not think sufficient cause has been shown for not acting upon his interposition.

The suit must be dismissed. I do not give costs.

Tebbs & Sons, proctors for the plaintiff.

Pritchard & Sons, proctors for the defendant.

(a) Lushington, 292.

(b) Lushington, 541.

(c) Lushington, 377.

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Jan. 26.

Feb. 8.

THE KATE.

Salvage—Jurisdiction—Costs and Damages—Crassa Negligentia—17 & 18 Vict. c. 104, s. 460—25 & 26 Vict. c. 63, ss. 49, 50.

By the 460th section of the Merchant Shipping Act, 1854, and the 49th section of the Amendment Act, 1862, the Court of Admiralty has not jurisdiction to determine and award the amount of salvage due, if the value of the property saved is proved not to exceed 1,000*l.*; but, nevertheless, it retains jurisdiction to condemn, in costs and damages, salvors so wrongfully arresting property and for other collateral purposes. *Lawford v. Partridge*, 1 H. & N. 621, distinguished.

The Court will not decree for damages unless the circumstances show *mala fides* or *crassa negligentia* on the part of the salvors in arresting, whereof the fact that the salvors arrested without first obtaining a valuation of the property from the receiver of wreck (as provided for by sect. 50 of 25 & 26 Vict. c. 63) is not conclusive evidence.

THIS was a cause of salvage, instituted by the owners of the steam-tug *Triumph* against the brig *Kate*, freight and cargo, for services rendered in November, 1863. On the 3rd December the *Kate* was arrested by the plaintiffs in the sum of 500*l.* On the 12th December an appearance was entered on behalf of the owners; affidavits were at the same time filed, showing that the value of the property saved (ship, freight and cargo) was 650*l.* and no more; and notice of motion was given for the dismissal of the suit, with costs and damages. On the 16th December the plaintiffs allowed the property to be released without bail. The hearing of the motion was postponed at the request of the plaintiffs; and on the 20th January they filed a valuation by a valuer, appointed by the receiver of wreck for Southampton, which was dated 15th December, and stated the value of the property to be 820*l.*; and also affidavits placing the value at a still higher amount. The defendants had meanwhile filed their proofs of damage, for detention, wharfage dues, &c., amounting altogether to 110*l.*

The 17 & 18 Vict. c. 104, s. 460, provides that in certain cases of dispute with respect to salvage "the disputes shall be referred to the arbitration of any two justices of the peace," &c.

The 25 & 26 Vict. c. 63, s. 49, extends such provision "to all cases in which the value of the property saved does not exceed 1,000*l.*;" and sect. 50 provides that "whenever any salvage question arises, the receiver of wreck may, upon application from either of the parties, appoint a valuer to value the property

in respect of which the salvage claim is made, and shall when the valuation has been returned to him, give a copy of the valuation to both parties; and any copy of such valuation, purporting to be signed by the valuer and attested by the receiver, shall be received in evidence in any subsequent proceeding," &c.

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Vernon Lushington in support of the motion.—The arrest was wrongful ab initio: *The William and John* (a). The respondents are therefore entitled to costs as of course. They ought also to have the damages they have actually suffered. Damages, if not to be awarded in every case where the value of the property falls short of the statutory mark, 1,000*l.*, ought at least to be given when the plaintiffs, as in this case, arrest without previously obtaining a valuation from the receiver of wreck, as provided for by 25 & 26 Vict. c. 63, s. 50. The arrest then amounts to an act of *crassa negligentia*, upon which damages clearly follow: *The Evangelismos* (b). Damages were given in the recent case of the *Eleonore* (c), a case in all important respects like the present. So in the case of the *Victor* (d), where cargo was improperly kept under arrest for a claim unfounded in law.

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Milward, contra.—The value of the property was so nearly 1,000*l.* that it was not *crassa negligentia* on the part of the plaintiffs to arrest, and they withdrew as soon as the value of the property was ascertained. Without *crassa negligentia* and without *mala fides*, which is not imputed here, there can be no claim of damages for setting the law in motion: *Evangelismos* (b). But on another ground the Court can neither give costs nor damages. The jurisdiction of this Court having been taken away by the statute 25 & 26 Vict. c. 63, this Court has no power to make any order in the case. The proceedings are *coram non judice*, and altogether void: *Tinniswood v. Pattison* (e); *Cannon v. Smulwood* (f); *Lutford v. Partridge* (g). This last case is directly in point to show that the Court cannot even give costs.

Lushington in reply.—The proceedings here are *in rem*; and the Court must have power to direct the disposal of the property in its hand; and if so, the ordinary power of the Court to award damages continues also. The jurisdiction of this Court, moreover, is not wholly taken away by the statute 25 & 26 Vict.

(a) Ante, p. 49.

(b) Swabey, 378.

(c) Ante, p. 185.

(d) Lushington, 72.

(e) 3 C. B. 247.

(f) 3 Lev. 203.

(g) 1 H. & N. 621.

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c. 63 : it is taken away by implication merely, that is, only so far as is necessary ; and upon reference to 17 & 18 Vict. c. 104, s. 460, it appears that all that is taken away is the right to “determine the dispute with respect to salvage.”

Cur. adv. vult.

Feb. 2.
Judgment.

DR. LUSHINGTON.—The defendants pray a decree for costs and damages. The plaintiffs now say that the Court, having no jurisdiction over the case at all, has no jurisdiction to give costs and damages ; and in support of this contention, Mr. Milward has cited the cases of *Tinniswood v. Pattison* (a) and *Lawford v. Partridge* (b). In *Tinniswood v. Pattison* it was held that a County Court could not proceed in replevin after a plea or cognizance setting up a title to freehold, although no issue was taken on that part of the plea ; but it must be observed that that was a question of proceeding with the cause, not of costs. The case of *Lawford v. Partridge* goes further, for it decided that, inasmuch as the County Court had by statute no cognizance of the case, it had no power to nonsuit and give costs ; and during the argument the Lord Chief Baron said (which is no doubt true), “after a prohibition the judge can do nothing, not even give costs.” I have no disposition to assume a right to question this authority, but I will observe that it was founded upon an express enactment that the County Court “shall not have cognizance of any action of ejectment in which the title to any corporeal or incorporeal hereditaments shall be in question.”

The present case differs from that in several important respects. In the first place the Court of Admiralty had original jurisdiction in all cases of salvage, and still holds and exercises that jurisdiction, save as regulated by the Merchant Shipping Act, 1854, and the Amendment Act, 1862. The positive direction contained in the former statute, that in certain cases the dispute shall be referred to the justices, appeared to me equivalent to a prohibition to this Court to *exercise* its jurisdiction in such cases, but it does not do more than that. In the second place, the proceedings in this Court are *in rem*, valuable property is arrested and detained by process of the Court, and hence arise strong reasons in favour of allowing the Court its usual powers of dealing with the property and the incidental rights of the parties, notwithstanding it has not authority to proceed with the main course of the cause. For instance, without the order of the Court, the marshal cannot release the property, and how can the Court order its release if its hands are tied altogether ? Property might thus remain

(a) 3 C. B. 247.

(b) 1 H. & N. 621.

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under detention for an indefinite time. Again, who is to pay the legal expenses of the custody of the property? Again, it must be admitted to be right and just that a defendant whose property has been wrongfully arrested and detained should recover costs and damages. As a fact it has always been considered within the power and practice of this Court to award costs and damages in such cases, and this practice, which does justice in the simplest and most direct way, received the approbation of the Judicial Committee in the *Evangelismos* (a).

I am of opinion, therefore, that I have power in this case to make a decree for costs and damages. My decree, however, will be for costs only. The defendants are not in my opinion entitled to damages, because the circumstances of the case do not show on the part of the plaintiffs any *mala fides* or *crassa negligentia*, without which, according to the case of the *Evangelismos*, unsuccessful plaintiffs are not to be mulcted in damages. A similar principle obtains in common law: *Davies v. Jenkins* (b).

Decree for costs only.

Ayrton, proctor for the plaintiffs.

Dyke and Stokes, proctors for the defendants.

THE INDIA.

Repeal of Statute by Implication—7 Geo. I. c. 21, s. 2.

No statute can lose its force by non-user alone. Presumption is against repeal of a statute by implication; but a subsequent statute, though not expressly referring to it, will be taken to have repealed a prior one, if the provisions of the two statutes are incompatible with each other, or would lead to absurd consequences.

The 7 Geo. I. c. 21, s. 2, prohibiting loans of bottomry by British subjects upon foreign ships engaged in the East India trade, is repealed.

THE question raised in this case was whether the 2nd section of 7 Geo. I. c. 21 was still in force.

Jan. 12, 26.

This was a cause of bottomry instituted against the India, a Monte Video vessel. In January, 1859, the India left Monte Video bound for Calcutta with a cargo of horses: in February,

(a) *Swabey*, 378.

(b) 11 M. & W. 715.

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1859, being at Table Bay in the course of his voyage, the master was obliged to borrow money on bottomry, and the lender was a British subject. In order to pay off this bond, the master, after his arrival in Calcutta, gave another bottomry bond, in favour likewise of British subjects, payable at the Mauritius, to which place the India was about to sail. The defendant, the owner of the India, in his answer alleged that both the bonds were void by virtue of 7 Geo. I. c. 21, s. 2, which is as follows:—

“All contracts and agreements whatsoever at any time from and after the said 24th day of June, 1721, made or entered into by any of his Majesty’s subjects or any persons in trust for them for or upon the loan of any moneys by way of bottomry on any ship in the service of foreigners, and bound or designed to trade in the East Indies or parts aforesaid, shall be and are hereby declared to be void.”

A motion was now filed on the part of the plaintiffs, that the answer might be amended so far as its contents referred to the statute.

The following statutes bear upon the point raised in the motion:—37 Geo. III. c. 117; 53 Geo. III. c. 155, preamble; ss. 2, 6; 54 Geo. III. c. 34; 4 Geo. IV. c. 80; 3 & 4 Will. IV. c. 85, preamble; ss. 2, 3, 4; 3 & 4 Will. IV. c. 93, preamble; ss. 1, 2; 21 & 22 Vict. c. 106.

It is not necessary in this report to do more than refer to any of the above enactments, with the exception of the 3 & 4 Will. IV. c. 93, which was chiefly relied upon in the argument. That statute recites, “Whereas the exclusive right of trading with the dominions of the Emperor of China, and of trading in tea, now enjoyed by the United Company of Merchants of England trading to the East Indies, will cease from and after the 23rd day of April, 1834: And whereas it is expedient that the trade with China, and the trade in tea, should be open to all His Majesty’s subjects; and that the restrictions imposed on the trade of His Majesty’s subjects with places beyond the Cape of Good Hope to the Straits of Magellan, for the purpose of protecting the exclusive rights of trade heretofore enjoyed by the said Company, should be removed.”

The first two sections repeal certain statutes (4 Geo. IV. c. 80, 6 Geo. IV. c. 107, and 6 Geo. IV. c. 114), or parts of them, from the 22nd April, 1834, and the second section concludes thus:—“Thenceforth (notwithstanding any provision, enactment, matter or thing made for the purpose of protecting the exclusive rights of trade heretofore enjoyed by the said Company in any charter

of the said Company in the said Act or any other Act of Parliament contained), it shall be lawful for any of His Majesty's subjects to carry on trade with any countries beyond the Cape of Good Hope to the Straits of Magellan."

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Deane, Q. C., and *Clarkson*, in support of the motion.—The 2nd section of 7 Geo. I. c. 21, must be considered as now repealed. Its purpose was, as remarked by Park on Insurance(a), solely in aid of the monopoly of trade which the East India Company once enjoyed. That monopoly was removed as to India by the 53 Geo. III. c. 155, and as to China by the 3 & 4 Will. IV. c. 93; and the Company itself was abolished by the 21 & 22 Vict. c. 106.

The section in question therefore is repugnant to all these Acts.

If it is necessary to refer to any statute in particular, we would specify the 2nd section of 3 & 4 Will. IV. c. 93, which makes it lawful for her Majesty's subjects "to carry on trade with any countries beyond the Cape of Good Hope to the Straits of Magellan." It would be absurd that British subjects should be allowed all other forms of trade and not bottomry. As a fact they do lend on such bottomry; and this extinct statute has not been raised against them before. The statute has apparently not been cited in Court since the case of *Paxton v. Popham*(b), in the year 1808.

Lushington, contra.—The case is within the words of the statute, which has never been repealed: and is referred to as binding in the most recent books of authority: Abbott on Shipping(c); Maclachlan on Shipping(d); Tudor's Mercantile Cases(e); Smith's Mercantile Law(f); Marshall on Insurance(g).

The 5th section of 19 Geo. II. c. 37, which contains provisions as to bottomry of ships bound to the East Indies, is also not repealed, and forms part of the important statute which forbids wagering insurances.

Nothing short of demonstration will show that a statute is repealed by mere implication. The recent case of *Attorney-General v. Sillem*(h) is an authority that the letter of a statute

(a) Page 871.

(b) 9 East, 409.

(c) 10 Ed. p. 114.

(d) Page 46.

(e) Page 53.

(f) 5 Ed. p. 402.

(g) (Ed. 1861), pp. 585, 586.

(h) 2 H. & C. 431, 508, &c.

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is notto receive a forced construction upon reasons or notions of public policy. So in the case of *Essays and Reviews* (a), this Court, referring to *Ashford v. Thornton* (b), said "The law must be obeyed even in what may be termed most extravagant circumstances." Here it is quite possible that the "trading" which is now permitted to her Majesty's subjects generally and to foreigners to the East Indies may coexist with a prohibition against bottomry.

Cur. adv. vult.

Jan. 26.
Judgment.

DR. LUSHINGTON.—No doubt exists that a British Act of Parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force: but the fact of non-user may be extremely important, when the question is whether there has been a repeal by implication. What words will constitute a repeal by implication, it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would be declared in express terms; so on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would I conceive be repealed by implication, if its provisions were wholly incompatible with a subsequent one, or if the two statutes together would lead to wholly absurd consequences, or if the entire subject matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute would not have been intended to subsist, and yet if it were left subsisting no palpable absurdity would be occasioned.

Previous to this statute of 7 Geo. I. c. 21, the whole of the East India trade was a strict monopoly in the hands of the East India Company. Not only had there been a series of parliamentary charters, but foreign ships were further excluded from trading to British possessions in India by virtue of the Navigation Act, 13 Car. II. c. 18. This statute of 7 Geo. I. confirms the monopoly; the title being "An Act for the further preventing his Majesty's Subjects from trading to the East Indies under foreign Commissions, and for encouraging and further

(a) 1 New Reports, 196, 200.

(b) 1 B. & Ald. 405.

securing the lawful Trade thereto," &c. The 2nd section contains several provisions for preventing any foreign trade, and, amongst others, it prohibits all contracts of bottomry by British subjects on ships in the service of foreigners. It is manifest that the sole object for this prohibition is the protection of the monopoly.

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The relaxation of this monopoly was a gradual process both as to place and person. The monopoly continued longer as to China than as to the East Indies, and excluded foreigners longer than British subjects other than servants of the Company. The abolition, so far as concerns British subjects, was effected by the 2nd section of 3 & 4 Will. IV. c. 93, (an Act to regulate the trade to China and India,) which declares that notwithstanding any provision made for the purpose of protecting the exclusive rights of the trade theretofore enjoyed by the Company in any Act of Parliament contained, it should be lawful for any of his Majesty's subjects to carry on trade with any countries beyond the Cape of Good Hope to the Straits of Magellan.

Then with regard to foreigners,—in 1797, the statute 37 Geo. III. c. 117, was passed, reciting the Navigation Act, and empowering the Directors of the East India Company to admit foreign ships to trade to the East Indies notwithstanding the statute.

The Court of Directors exercised this power by issuing a regulation to be found in Hertslet, vol. vi. p. 535. The regulation provides, "that foreign ships belonging to every state or country in Europe or in America, so long as such states or countries respectively remain in amity with her Majesty, may freely enter the British sea-ports and harbours in the East Indies, whether they come directly from their own country or from any other place, and shall there be hospitably received, and shall have liberty to trade there in imports and exports conformably to the regulations established or to be established in such seaports;" and then follows a proviso that they shall not engage in the coasting trade. Since that period various other measures have been adopted to put the foreign trade with India on the same footing as the trade carried on in British vessels and by British subjects.

By an Act of the Government of India, No. 6, 1848, the duties on goods imported or exported in foreign and British vessels were equalized; and by No. 5, of 1850, the coasting trade of India was thrown open to foreign vessels on the same terms as to British vessels.

The trade therefore to India is now as open to foreign as to British vessels. If this be so, not only has all possible reason for the prohibition contained in sect. 2 of 7 Geo. I. c. 21 of bottomry on foreign vessels engaged in the India trade ceased to

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exist, but the continuance of that statute would be inconsistent with the state of trade as established by subsequent statutes. I therefore am of opinion that the stat. 7 Geo. I. c. 21, s. 2, is repealed by implication.

Ashurst, Morris & Co., solicitors for the plaintiffs.

Rothery & Co., proctors for the defendant.

THE NORWAY.

Charter-party, how far incorporated by Bill of Lading—24 Vict. c. 10, s. 6—"Breach of Duty"—Rights of Assignee of Bill of Lading at Common Law, and Rights in the Admiralty Court.

The 6th section of 24 Vict. c. 10, gives a remedy in the Admiralty Court for all cases within the words of the section, whether or not in analogous cases there is a right of action at common law.

Within the words of that section it is "a breach of duty" for the master to withhold from the holder of a bill of lading such particulars within his knowledge as are necessary in order to compute the amount of freight and general average contribution.

The same section gives an assignee of a bill of lading a right to sue in the Admiralty Court for damage done to his goods, or other breach of contract, before he is entitled to delivery of the goods; at least if he is entitled to sue for non-delivery.

In a bill of lading, where freight is made "payable as per charter-party," this reference incorporates into the bill of lading all the clauses in the charter-party which relate to the amount of freight, but only for the purpose of computing the amount of freight, not for the purpose of transferring to the holder of the bill of lading the benefit of covenants found in the same clauses of the charter-party, but not affecting the amount of freight.

Where a charter-party stipulated for lump freight, "the master guaranteeing the ship to carry 3,000 tons on a draft of 26 feet water, or to forfeit freight in proportion to the deficiency," and the ship could not, and in fact did not, carry a cargo of 3,000 tons: *Held*, that an assignee of a bill of lading for such cargo, making freight "payable as per charter-party," had no cause of action against the ship in respect of the master fraudulently guaranteeing, &c.

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 Feb. 12.

THIS was a suit brought by George Ashburner, an assignee of certain bills of lading, against the ship *Norway*, under the 6th section of the Admiralty Court Act, 1861.

24 Vict. c. 10, s. 6:—"The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales," &c.

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The defendants, owners of the Norway, moved that the petition should be rejected. The petition, so far as it is material to this report, was in the following terms:—

1. The Norway is an American ship. No owner or part-owner was, at the time of the institution of this cause, domiciled in England or Wales.

2. On the 2nd of November, 1861, a charter-party was executed in London between Captain H. B. Major, master of the Norway, of the one part, and W. N. De Mattos, Esquire, of London, of the other part. The said charter-party was as follows:—

“ London, 2nd November, 1861.

“ It is this day mutually agreed between Captain H. B. Major, of the good ship or vessel called the Norway, A 1, of the burthen of 2,078 tons per register, or thereabouts, now lying in the port of Liverpool, whereof he is at present master, of the one part, and W. N. De Mattos, Esquire, of London, merchant and freighter, of the other part: that the said ship being tight, staunch and strong, and every way fitted for the voyage, shall with all convenient speed, be made ready and load at Liverpool a cargo of salt not exceeding 2,200 tons, and therewith proceed to Calcutta, and after the discharge of the outward cargo reload (or at the freighter's option proceed to Rangoon, Akyab or Bassein) a full and complete cargo of lawful merchandise, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to Cowes, Queenstown, or Falmouth, at master's option, for orders to proceed to London, Liverpool, Bordeaux, Havre, Antwerp or Marseilles, or so near thereunto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas and navigation, fire, pirates and enemies during the said voyage always excepted). Ninety days are

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to be allowed the said merchant (if the ship be not sooner dispatched) for discharging the outward cargo of salt and loading at Calcutta or the Rice ports, and the vessel to be unloaded at port of discharge according to the custom of the port, the freighter having the option of keeping the said vessel on demurrage to the extent of ten days over and above the said laying days, if so required. In consideration whereof and everything before-mentioned the said merchant does hereby promise and agree to load and receive or cause to be laden and received in the manner and within the time herein mentioned for these purposes, and pay or cause to be paid as freight for the use and hire of the said vessel 11,250*l.* lump sum if ordered to the United Kingdom, Havre or Bordeaux, 11,625*l.* sterling if ordered to Antwerp or Marseilles, *the master guaranteeing to carry 3,000 tons dead weight of cargo upon a draft of twenty-six feet of water, or to forfeit freight in proportion to deficiency.* The vessel to be loaded at port of lading to such a draft of water as the freighter or his agents may in connexion with the Pilot Commissioners consider safe to proceed to sea, lighterage, if any, to fill up the ship below the flats, to be at freighter's expense, payment whereof to become due and to be paid as follows; viz.—2,000*l.* to be advanced on the vessel clearing at Liverpool, subject to insurance only, say 1,000*l.* by freighter's acceptance at four months, and 1,000*l.* at six months, sufficient cash for ship's disbursements, not exceeding 2,500*l.*, to be advanced at Calcutta, and the necessary disbursements if ordered to the Rice ports, subject to interest and insurance only, all at current rate of exchange for six months' bills on London against the captain's receipts. Such advances to be made on account of chartered freight, and the balance as follows, viz.—one third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the said port of discharge, by good and approved bills payable in London or cash, equal to three months' date from the delivery, if discharged in the United Kingdom, or in cash at current rate of exchange if discharged on the Continent, less three months' interest. And also to pay for each and every day the vessel is detained beyond the times hereinbefore mentioned demurrage at the rate of 30*l.* per day, to be paid day by day, or as the owner or captain may agree for it otherwise. The master shall sign bills of lading as tendered, without prejudice to this charter-party. The vessel, if ordered from Calcutta to load at the Rice ports, to proceed within forty-eight hours, wind and weather permitting, after receiving her dispatches to sail. The customary port charges

and towage at the Rice ports to be borne by the freighter as well as the actual cost of ballasting required for the ship at Calcutta. The cargo to be brought to and taken from alongside at merchant's risk and expense. The vessel to be addressed at all ports to freighter's agent, paying one commission only on the charter not exceeding five per cent. And for the true performance hereof the said parties hereunto bind themselves, their respective heirs, executors, assigns, the said vessel, her freight and appurtenances, and the said freighter the cargo to be laden on board the said vessel, each unto the other in the said penal sum of 12,000*l.* of good and lawful money of Great Britain, it being agreed that, for the payment of all freight, dead freight, demurrage or other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board. The brokerage on this charter-party, five per cent., is due by the ship on perfecting this agreement to Pilkington Brothers.

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“ In witness, &c.”

3. At the time of entering into the said charter, Captain Major, who was also part-owner as well as master of the ship, well knew that the Norway could not carry 3,000 tons dead weight of cargo upon a draft of twenty-six feet of water, as stipulated in the charter-party, the ship not being in fact, as he well knew, of sufficient capacity for that purpose.

4. Subsequently to the making of the charter-party, and before the arrival of the Norway at Calcutta as hereinafter mentioned, it was agreed between De Mattos the charterer, and the firm of Ashburner & Co., of Calcutta, that the homeward shipment on board the Norway under the charter should be on joint account, each a moiety; the firm of Ashburner & Co. to purchase the cargo and to manage the matter of the shipment.

5. In pursuance of the charter-party, the Norway proceeded to Calcutta and discharged her outward cargo. On arrival there on or about the 15th day of May, 1862, it was agreed between Ashburner & Co. and the master of the Norway that the Norway might go an intermediate voyage to Bombay without prejudice to the charter-party, and thence proceed to the port of loading according to the order of Ashburner & Co., there to load homeward according to the charter-party; and it was further agreed between them that Ashburner & Co. should advance moneys for the disbursements of the ship at Bombay, and that the same should be considered as advances of freight in pursuance of the charter-party, and should be deducted from

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 Jan. 26, 29. should not exceed the sum of 2,500*l.* mentioned in the charter-
 Feb. 12. party.

6. The Norway accordingly went to Bombay and thence in ballast by order of Ashburner & Co. to Rangoon, there to load rice in pursuance of the charter-party from the Burmah Company (limited), who were the agents of Ashburner & Co. at that place.

7. In or about the beginning of March, 1863, the Norway having arrived at the port of Rangoon, commenced to load rice there from the Burmah Company, who furnished the rice on account of Ashburner & Co. Having taken a certain quantity of rice on board in the anchorage off Rangoon, the ship then proceeded to below the Hastings Sand, which lies a few miles lower down the river than Rangoon, and, having there anchored, took on board, from boats hired by the Burmah Company, a further quantity of rice. The total quantity of rice shipped was 36,200 bags.

8. On the 10th, 13th, and 18th of March, 1863, the master of the Norway signed four sets of bills of lading in respect of the said 36,200 bags of rice, which consisted of four parcels. The bill of lading for the first parcel (to which the bills of lading for the other parcels *mutatis mutandis* correspond) was in the following form.

“Shipped in good order and well conditioned by the Burmah Company Limited in and upon the good ship called the Norway whereof is master for this present voyage H. B. Major and now riding at anchor in the Rangoon River and bound for Cowes Queenstown or Falmouth for orders as per charter-party thirteen thousand bags of cargo rice being marked and numbered as in the margin are to be delivered in the like good order and well conditioned at the port of discharge the act of God the Queen’s enemies fire and all and every other dangers and accidents of the seas rivers and navigation of whatever nature and kind soever excepted unto order or to assigns *freight for the said goods payable as per charter-party* with primage and average accustomed. In witness, &c.

“Dated in Rangoon, 10th March, 1863.

“H. B. Major.”

9. The said bills of lading were indorsed by the Burmah Company and Mr Cator, their agent at Rangoon, and were

subsequently assigned to the plaintiff, who at the time of the institution of this cause was also the owner of all the rice covered by the said bills of lading.

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10. The said 36,200 bags of rice were in dead weight several hundred tons short of the three thousand tons mentioned in the charter-party, and the Norway, loaded with the said 36,200 bags, drew less than 26 feet of water. The depth of water in the channel between Rangoon and the sea, and more especially in the channel between the place where the ship was anchored below the Hastings Sand and the sea, was throughout enough to enable a ship of larger draft than 26 feet to proceed safely to sea. All matters and things were done on behalf of De Mattos the charterer, and Ashburner & Co., and the Burmah Company, to entitle them to a performance of the charter-party by the master of the Norway, but the master of the Norway, without lawful excuse, broke the said charter, and without loading his ship at the port of Rangoon or elsewhere in the river Irawaddy to such a draft of water as the freighter's agent in connexion with the Pilot Commissioners considered safe to proceed to sea, and without waiting for or requesting any opinion on the said matter from the freighter's agent or the Pilot Commissioners, caused his ship, on the 27th of March, 1863, to be towed from the anchorage below Hastings Sand aforesaid and proceeded forthwith on his voyage to Europe with the 36,200 bags of rice on board and no more.

11. On the voyage to Europe the master of the Norway threw overboard part of the rice shipped, and sold a further part of the rice at Mauritius, and also hypothecated at the Mauritius the ship, freight and cargo by a bottomry bond made payable twenty days after arrival of the ship at her port of discharge; but of all these circumstances no advice was given or account rendered to the plaintiff or the charterer by the master of the Norway.

12. On or about the 10th of November, 1863, the Norway arrived at Falmouth, one of the order ports mentioned in the charter-party, and on or about the 13th of November De Mattos the charterer duly gave orders to the master to proceed to Liverpool, there to discharge in either the Albert, Stanley or Wapping Dock; the cargo to be addressed at Liverpool to the firm of Bushby and Co. The said Albert, Stanley and Wapping Docks are closed docks, with warehouses convenient for warehousing, sorting and re-exporting rice cargoes, and are the docks customarily used in Liverpool for the discharge of rice-laden ships.

13. On or about the 17th November the Norway arrived at

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Liverpool, and anchored in the river Mersey. The state of the tides was then nearly spring, and the Norway, which was not drawing 23 feet of water, might have safely been taken into any one of the three docks to which the charterer had directed her; but the master alleged to Bushby & Co. that for this purpose it would be necessary to lighten the ship of about 150 tons of cargo in the river, and further said that he would insist on payment of full freight before delivery of any part of the cargo.

14. The plaintiff thereupon made application to the firm of Baring Brothers, who were the holders of the bottomry bond hereinbefore mentioned, and on the 23rd November gave the said firm his undertaking to pay in due course the proportion of the bottomry bond which would fall upon cargo, and thereupon Baring Brothers consented that the ship might be lightened in the river.

15. The said consent of Baring Brothers was, on or about the 24th November, duly notified by Bushby & Co. to the master of the Norway; but on the same day the master wrongfully demanded to be paid 6,500*l.* as freight, and a further sum of 1,000*l.* by way of general average contribution as a condition precedent to delivery of any part of the cargo, and refused to deliver the cargo on any other terms, and on the same day caused his ship to be taken into the Canada Dock without being lightened.

16. The Canada Dock is an open dock situate at the extreme north end of Liverpool, customarily used for discharging timber ships, and is without convenient warehouses for warehousing, sorting, and re-exporting rice cargoes or cargoes of the like nature. Leading out of the Canada Dock is the Stanley Dock, into which the Norway might, on the said 24th November, have been safely taken.

17. The plaintiff was at all times and is ready, upon delivery of the cargo, to pay to the master of the Norway all sums due to him as freight and general average, and expressly offered the master to pay into the hands of a third party the full amount in dispute to await the final result, which the master refused. The plaintiff refused to pay the sum of 7,500*l.* demanded, as being excessive, and on account of the refusal of the master to deliver on any other terms the plaintiff did not make the usual Customs entry of the cargo provided for by the Customs Act Consolidation Act, 1853 (16 & 17 Vict. c. 107, s. 55, et seq.)

18. On the 7th of December the master of the Norway took up the bottomry bond, and on or about the 8th of December made entry of the cargo in his own name under the provisions of the Merchant Shipping Act Amendment Act, 1862, (25 & 26

Vict. c. 63, s. 67, et seq.) On or about the same day, 8th December, Mr. De Mattos the charterer stopped payment.

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19. Various interviews and letters relating to the delivery of the cargo having passed between Bushby & Co., the agents for the cargo, and Messrs. A. Taylor & Co., the brokers acting for the ship, and between Messrs. Bateson & Robinson, solicitors, of Liverpool, acting on behalf of the plaintiff, and Mr. John Yates, solicitor, of Liverpool, who was acting as solicitor to the ship, on the 10th December Messrs. Bateson & Robinson wrote and delivered to Mr. Yates the following letter:—

“Dear Sir—Norway—We send you a notice for your clients, Messrs. A. Taylor & Co., the receipt for which please to acknowledge. The money will be sent down in the morning.

“Yours truly,

“John Yates, Esq.

BATESON & ROBINSON.”

“26, Castle Street, Liverpool, 10th December, 1863.

“Sir—On behalf of the holders of the bills of lading and owners of the cargo of rice per your vessel the Norway, we give you notice that they protest against your taking charge of the cargo of that vessel when landed from the ship, and that Messrs. Bushby & Co., their agents here, are ready and willing to take delivery as customary, and that they hold you and the ship, and also Messrs. A. Taylor & Co., as master porters, liable for all loss, damage, or expense, sustained by reason of the cargo not having been properly sampled, marked and classified on landing. And we give you notice that Messrs. Bushby & Co. intend to enter the cargo first thing to-morrow morning and claim the delivery to them, and that, as we before advised your solicitor, they are ready to pay you in cash one-third balance of freight as per charty-party, and also to make you a payment on account of general average.

“To cover these sums we are desired to say that Messrs. Bushby will pay you 3,100*l.* (which exceeds the amount now due), and the balance of freight, they instruct us to say, they will pay on the true and final delivery of the cargo as per charter.

“Yours respectfully,

“BATESON & ROBINSON.

“Captain H. B. Major, ship Norway,

“Care of Messrs. A. Taylor & Co.”

20. In reply to this letter and notice, A. Taylor & Co. on the same day, wrote and delivered to Messrs. Bateson & Robinson a letter, the material terms of which were as follows:—

“Liverpool, 10th December, 1863.

“Gentlemen—We have just received yours of this date

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through Mr. Yates. Messrs. Bushby & Co. may protest as much as they please, but Captain Major will not deliver one bag of rice till the whole of his freight and other claims on the cargo are satisfied.

“ We are, gentlemen,

“ Most respectfully yours,

“ A. TAYLOR & Co.”

On the 12th of December Mr. Yates, solicitor to the master of the Norway, waived any tender on the part of the plaintiff of any sum of money short of the 7,500*l.* hereinbefore mentioned, and the actual production of the bills of lading, and the said Mr. Yates, on the part of the Norway, now continues to insist on the payment of 7,500*l.* as a condition precedent to the delivery of any part of the cargo.

21. The rice of the plaintiff has been and is now being discharged by the master of the Norway, in the Canada Dock, and has been and is being placed by the master on and in wharfs and warehouses on and in which goods of a like nature are not usually placed, contrary to the provisions of the 67th section of the Merchant Shipping Act Amendment Act, whereby great damage has been and is being done to the said rice, and the sale of the said rice is necessarily prejudiced ; and whensoever the same shall be delivered to the plaintiff great expenses will necessarily be incurred by the plaintiff in carting the said rice to convenient and proper warehouses, and otherwise.

22. The master of the Norway has persisted in refusing to give the plaintiff particulars concerning the weight of cargo shipped at Rangoon, the alleged jettison and sale of part cargo, and other matters necessary for the right calculation of the amount of freight and general average due from the cargo to the ship.

23. [Commenced with a list of sums advanced by the charterer, or his agents, to the master, on account of freight, and continued thus] :—

The plaintiff claims that, in order to ascertain the balance of freight now due from the plaintiff to the defendants, in respect of which the defendants have a lien on the plaintiff's cargo, the said sums are to be deducted from the gross sum of 11,250*l.*, the lump freight mentioned in the charter.

The plaintiff further claims to deduct the commission as per charter-party due from the ship to the freighter's agent. The plaintiff further claims to deduct the value of his goods thrown overboard by the master of the Norway, and the value of his goods sold by the master as aforesaid.

The plaintiff further claims that inasmuch as the Norway could not carry 3,000 tons dead weight of cargo and did not carry the said 3,000 tons as stipulated in the charter, part of the freight otherwise secured by the charter-party was and is forfeited, namely, in proportion to the deficiency from the said 3,000 tons. The plaintiff further claims that in respect of the one-third balance by the charter-party to be paid on arrival of the ship at port of delivery the defendants had no lien, inasmuch as the said sum being payable before delivery of the cargo is not freight.

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24. The plaintiff contends that by reason of the premises, the master of the Norway has committed breaches of duty and breaches of contract, for which the ship and freight are responsible to the plaintiff, by the provisions of the Admiralty Court Act, 1861, in respect of, amongst others, the following matters, namely :—

(a). In wrongfully guaranteeing in the charter-party that the Norway could carry 3,000 tons dead weight of cargo, he the said master well knowing that the said ship could not carry the said 3,000 tons as provided in the said charter.

(b). In not loading the ship at the port of loading to such a draft of water as the freighter's agent, in connexion with the Pilot Commissioners, considered safe to proceed to sea, as provided for in the charter, and in not asking and waiting for such an opinion from them.

(c). In not carrying 3,000 tons dead weight of cargo, as provided for in the charter.

(d). In throwing overboard part of the plaintiff's cargo on the voyage.

(e). In selling part of the plaintiff's cargo on the voyage.

(f). In refusing to discharge in either the Stanley, Albert or Wapping Dock, as lawfully directed by the charterer, and in persisting without lawful excuse in such refusal.

(g). In not unloading the ship at Liverpool, the port of discharge, according to the custom of the port, as provided for by the charter-party.

(h). In placing the rice of the plaintiff on and in wharfs and warehouses, on and in which goods of a like nature are not usually placed ; thereby violating the requirements of the Merchant Shipping Act Amendment Act, 1862.

(i). In wrongfully claiming from the plaintiff for alleged freight and general average contribution a larger sum than was due to him the said master for the same, and in

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wrongfully detaining the plaintiff's cargo by way of lien for such excessive sum.

(k). In wrongfully withholding from the plaintiff particulars of the weight of cargo shipped, of the jettison and sale of part cargo, and of other matters necessary for the right calculation of the amount of freight and general average contribution due from the cargo to the ship.

(l). In not delivering the rice of the plaintiff according to the contract contained in the bills of lading.

(m). In breaking the contracts contained in the said charter-party and bills of lading.

The prayer was for the Court to pronounce for all damages occasioned to the plaintiff by the said breaches of duty and breaches of contract mentioned in the petition, and to condemn the Norway and her freight in the same and in the costs of the cause.

Brett, Q.C., and Cohen, in support of the motion to reject the petition.—As to claims (a), (b), (c), they are put forward as claims under the charter-party. But the plaintiff was a stranger to the charter. He, therefore, would have no right of action at common law, and obtains none in the Admiralty Court under the statute: *St. Cloud* (a). Nor are these covenants in the charter-party incorporated in the bill of lading by the reference "payment of freight as per charter-party:" *Smith v. Sieveking* (b); *Chappel v. Comfort* (c).

The plaintiff suffered no damage by breach of the guarantee as to the amount of cargo. There is nothing to show that he or the shipper ever speculated upon dealing with a larger quantity of rice than that specified in the bills of lading. As to (a), (b), (c), (d), (e), the claim is made for goods *not* carried into England, and therefore not within the terms of the 6th section of the Act.

As to (d), (e), it is pleaded that the goods were thrown overboard or sold, but not that they were so done wrongfully.

As to (f), neither charter-party nor bill of lading refers to any particular dock. As to (k), the master is under no legal obligation to communicate particulars. The assignee of the bills of lading must tender what is due.

As to (d), (e), (g), (l), (m), the plaintiff cannot sue for damage to his goods, or for breach of contract, whilst the master has his lien for freight, and he had a lien for one-third of the balance of

(a) Ante, p. 4.

(c) 10 C. B., N. S. 802.

(b) 4 Ell. & Bl. 945; 5 Ell. & Bl. 589.

freight, although it was payable before delivery: *Kirchner v. Venus*(a); *Kern v. Deslandes*(b); *Santos v. Brice*(c); *Foster v. Colby*(d); *Maclachlan on Shipping*, 433, 441. The plaintiff could not sue either in trover or in detinue. 1864. Jan. 26, 29. Feb. 12.

Vernon Lushington, contra.—The plaintiff could sue for the fraud contained in the charter-party: *Langridge v. Levy*(e). This is a stronger case, because the shipowner continues to have, by virtue of the charter, a lien on the goods for the charter freight: *Pilmore v. Hood*(f).

But if not, the bill of lading incorporates all the material clauses of the charter-party. All the circumstances of the case show, and especially the stipulation for lump freight, that that was the intention of the parties. The assignee may even be liable for demurrage: *Smith v. Sieveking*(g), per Lord Campbell, quoting *Wegener v. Smith*(h).

The statute is remedial: it gives jurisdiction for a claim for “breach of duty.” It must clearly be a duty of the master to furnish particulars, and not to throw overboard or to sell the goods entrusted to him. The discharging in an improper place was contrary to the charter-party and bill of lading, contrary to the custom of the port, contrary to the Merchant Shipping Act Amendment Act.

If the plaintiff is not entitled to delivery, it is not by his own fault but the fault of the master. The fact that the plaintiff is not yet entitled to delivery does not prevent him from suing for breach of contract. The defendant has waived the tender of freight: *Hochster v. De la Tour*(i). The amount of deductions claimed is wholly immaterial to the present question.

The words in the 6th section, “goods carried” into any port in England or Wales, include “goods to be carried,” though not actually carried: *Dunzig*(k).

Brett, Q.C., replied.

Cur. adv. vult.

DR. LUSHINGTON.—The first objection raised to this petition is, that the Court has no jurisdiction, because no corresponding right of action exists at common law. It is said that if the owner of the vessel was resident in England, at common law

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(a) 12 Moore, P. C. 361.

(b) 10 C. B., N. S. 205.

(c) 6 H. & N. 290.

(d) 3 H. & N. 705.

(e) 2 M. & W. 519; 4 M. & W. 337.

(f) 5 Bing., N. C. 97.

(g) 4 Ell. & Bl. 951.

(h) 15 C. B. 285.

(i) 2 Ell. & Bl. 678.

(k) Ante, p. 102.

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the plaintiff could not sue in respect of a charter to which he was not a party, nor could he sue for injury done to goods before he was entitled to delivery of them; nor would he have any cause of action against the master for withholding the information by which alone the plaintiff could satisfy himself as to the reasonableness of the master's demand for freight. If this be so, it is argued that the Court has no jurisdiction under the 6th section of the Admiralty Court Act, 1861, because that section creates no new rights, but merely gives, in the case of the shipowner being out of the kingdom, a new remedy in this Court for rights which might have been enforced at common law, if the shipowner were here to be sued. In support of this position reliance is placed upon the *St. Cloud* (a). But all that I there decided was with respect to the bare assignee of a bill of lading. I held that he had no more rights in this Court under the 6th section of the Act than he has at common law, and I expressly grounded my decision upon the consequences which would flow from a contrary decision. But I did not state that in no case does the statute confer new rights. Without stating that rights unknown at common law are conferred by this statute, still less specifying them, I am of opinion that it is the duty of the Court so to construe the statute as to afford a remedy for all the evils contemplated in the statute itself. I therefore shall hold, that if damage has been done to goods carried or to be carried into any port in England or Wales by the negligence or misconduct of the owner, master or crew, or if there has been any breach of duty or breach of contract, then provided that the owner of the vessel is non-resident in this country, the Court has jurisdiction over a claim by the owner, consignee or assignee of the bill of lading, whether or not common law provides a remedy in the like cases against the owner of the vessel. This objection to the petition, therefore, so far as it is a general objection, fails.

The assignee
 of the bill of
 lading cannot
 sue for a breach
 of the charter.

Pursuing this objection, the defendants allege that this 6th section does not enable the plaintiff to sue for a breach of a charter to which he was no party; that is, for breach of a contract made not with himself but with another person. In this respect I think the defendants are right. De Mattos the charterer could not by any act of his own transfer to a third person his own rights under the charter against the shipowner, and I cannot think that the decision in the very peculiar case of *Langridge v. Levy* is an authority for the claim advanced by the

(a) Ante, p. 4.

petition for the plaintiff to sue in respect of the alleged fraudulent guarantee in the charter.

But then the plaintiff says, "I sue upon my own contract, the bills of lading; those bills of lading incorporate the charter; the violations of the charter-party are violations of the bills of lading." For the purposes of this argument, the four bills of lading may be considered as together constituting one single bill of lading; and it is not to be forgotten, that a bill of lading being a mercantile instrument not usually prepared by legal persons, is rightly interpreted with considerable latitude, with a view of ascertaining what was the true intention of the parties. This being so, the plaintiff urges that all the circumstances of this case show that the intent of the parties in the bill of lading was to incorporate everything of the charter-party which remained to be carried out. It was a contract made by the master as the agent of the shipowner with Ashburner & Co., who were the agents of the charterer; it was made therefore with the charter-party before the eyes of the contracting parties, and expressly refers to the charter-party. The freight was payable as per charter-party; the freight was lump freight; and lump freight it is said implies lump cargo. The master, therefore, did agree with Ashburner that the vessel should carry 3,000 tons of cargo. This is the contention of the plaintiff, but it is not sustainable. The general law on this point is clearly laid down by Mr. Justice Willes in the case of *Chappel v. Comfort* (a). "It is exceedingly important that we should adhere to the known rules of law upon this subject, which are as well (or perhaps better) known in the City of London as they are in Westminster Hall. One of those rules is that, where a charter-party is entered into, the special provisions of that charter-party are binding only as between the charterer and the shipowner: and that if a bill of lading is signed by the master, and that bill of lading comes to the hands of an assignee for value, the latter is entitled to have the goods delivered to him on the terms mentioned in the bill of lading, and, properly speaking, he is not bound to refer to the charter-party at all. It is exceedingly important that that should be so, and that having paid his money for the bill of lading, he shall be entitled to demand the goods, subject only to the payment of the charges mentioned in the document. Accordingly, it has always been understood under ordinary circumstances, that the assignee of a bill of lading is not liable for anything beyond the stipulated freight. It may be that for shortness, instead of stating the sums payable in

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The reference to the charter incorporates the provisions in the charter which apply to the computation of freight, but no more.

(a) 10 C. B., N. S. 802, 810.

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respect of different kinds of goods, a reference is made to the charter-party thus,—‘paying freight as per charter-party:’ but it is equally well established that, even in that case, the assignee of the bill of lading is only bound by the terms of the charter-party quoad the freight. It may be and it often does happen that the person who receives the goods intends to pay all the charges mentioned in the charter-party. But when it is intended that such an obligation should be imposed upon him, it should be done in plain words, as was done in *Wegener v. Smith* (a), where, by the terms of the bill of lading, the goods were made deliverable to order ‘against payment of the agreed freight and other conditions as per charter-party.’ In that case the assignee of the bill of lading is properly held to be bound to look to the terms of the charter-party, and to perform them so far as they apply to the goods.” Applying these observations to the present case: First, what is the reference in the bill of lading to the charter-party? The bill of lading declares that the vessel is “bound for Cowes, Queenstown or Falmouth, for orders as per charter-party.” This incorporates the sentence in the charter that the vessel “shall proceed to Cowes, Queenstown or Falmouth, at master’s option, for orders to proceed to London, Liverpool, Bordeaux, Havre, Antwerp or Marseilles.” Again, the bill of lading states, that “freight for the said goods is to be payable as per charter-party.” This must include everything in the charter which has relation to freight. The clause that there should be paid for “freight 11,250*l.* lump sum, if the vessel is ordered to the United Kingdom, Havre or Bordeaux, and 11,620*l.* if ordered to Antwerp or Marseilles,” is clearly incorporated into the bill of lading. As to that which follows, I say that the holder of the bill of lading could not bring an action upon the guarantee in the charter, “the vessel to carry 3,000 tons dead weight of cargo, upon a draught of twenty-six feet of water;” or upon the agreement that “the vessel should be loaded at the port of loading to such draught of water as the freighter, or his agent in connexion with the Pilot Commissioners, should consider safe to proceed to sea;” but I do say, that the charter-party having provided “for a forfeiture of freight in proportion to deficiency,” and the bill of lading prescribing freight to be payable as per charter-party, reference must be made to this clause in the charter-party in order to compute the deficiency, and so to ascertain the amount of freight. Then further I consider that the whole clause in the charter-party, “2,000*l.* to be advanced on the vessel’s clearing less three months’ interest,” is incorporated into the bill of lading, and the consequence unfortu-

(a) 15 C. B. 285.

nately is, that the amount due for freight can only be ascertained through the medium of a complicated account of advances and disbursements.

In this state of things the master claims to detain the cargo until the whole amount he claims for freight and average has been paid him, and at the same time he refuses to give any information as to the particulars which are indispensable for the computation of the amount of freight and average rightly due—particulars which must be within his own knowledge, and cannot be within the knowledge of the holder of the bill of lading. That such conduct of the master is a “breach of duty” covered by the words of the 6th section of the Admiralty Court Act, 1861, I cannot bring myself to doubt, nor that it has occasioned delay and thereby injury to the holder of the bill of lading. The plaintiff therefore has a remedy in this Court, whether or not in analogous cases, when the shipowner is resident in this country, there would be a remedy at common law.

But then it is urged for the defendants that if the way in which the master has dealt with the goods on the voyage and at the port of delivery are breaches of the contract evidenced by the bill of lading, this suit cannot in its present form be maintained, because it is an attempt to set off damages for goods thrown overboard, sold and ill-wharfed against the master’s lien for freight; and the *Salacia* (a) was cited to show this cannot be done. But this question of the right to make deductions from freight does not arise on the present occasion; the petition, whatever may be said in the 23rd article, in the 24th article treats the throwing overboard, and selling and improperly wharfing the goods, as substantive breaches of the contract of bailment contained in the bill of lading.

But it is further alleged that the plaintiff is not in a position to sue upon such breach of contract. The plaintiff it is said is not entitled to delivery; *non constat* that he ever will be; until he is he cannot claim for damage done to the goods to be delivered. As to this it is true that the defendant has a lien upon the goods for his freight, and that the plaintiff cannot reduce this freight by setting off any damages done to his goods; and it may be that at common law, the plaintiff cannot bring an action of trover for the goods, because trover requires in a plaintiff the right not only of property but of possession, and the right of possession cannot coexist with a hostile lien: *Bloxam v. Sanders* (b). But I think that the same case decides that though trover does not lie, a special action will lie for damages

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It is a breach of duty in the master to refuse delivery until the whole of his claim for freight and general average is satisfied, and at the same time to refuse the particulars necessary for its computation which are within his knowledge.

(a) Lushington, 578.

(b) 4 B. & Cr. 941, 949.

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on the contract. If so, the plaintiff can sue for damages on account of any injury done to his goods by improper throwing overboard, or sale or unloading, or wharfing. He can also sue in damages for delay caused by the defendant making improper claims, and refusing to specify particulars. Lastly he can sue for non-delivery. All that is necessary to enable the plaintiff to recover is, that he should be willing to perform his own part of the contract. In this case, indeed, the plaintiff has neither paid the freight nor made a tender; but it is alleged in the petition—and the allegation must be taken to be true—that tender was waived, and that the plaintiff was willing and ready to pay what was really due.

Particulars in
which petition
to be amended.

The result of this judgment is that the petition must be reformed by striking out paragraphs (a), (b) and (c), which purport to allege a breach of the charter-party; but that those paragraphs (practically all the rest) which allege breaches of the bill of lading, as I have interpreted it, or damage occasioned by the misconduct of the master, must remain.

To prevent further unnecessary litigation, I will state how I think the litigant parties are circumstanced. The master has a lien on the cargo for his freight and average—an unliquidated amount. The holder of the bill of lading has the ship as security for the damage (if any) which he has sustained. The Court will not disturb the security which either party has without substituting an equivalent. So far as I can foresee what will take place, it is this: the master's claim for freight and average will have to be referred to the Registrar and Merchants. The claim for damages alleged by the holder of the bill of lading will be submitted to the like reference. Both ship and cargo should be released; but means should be taken to preserve the security which each party has for his demands. Accordingly, the plaintiff should pay into Court the amount of freight and general average he admits to be due, and give bail for the disputed residue in excess. Upon the money paid in, the plaintiff should have a lien to meet his claim for damages; and further if he makes an affidavit that the sum so paid in is insufficient to meet his claim, the defendants should give bail for the deficiency. I mean to prejudge nothing. It may be that the plaintiff is entitled to nothing, and it may be that the master's claim is exorbitant. But without some such arrangement, nothing can prevent an expensive and protracted litigation.

Elmslie, solicitor to the plaintiff.

Pritchard & Sons, proctors to the defendants.

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March 15, 22.

THE PACIFIC.

24 Vict. c. 10, s. 5—“*Domiciled*”—*Material Man*—*Mortgagee*
—*Priority*.

Where the Admiralty Court Act, 1861, confers a right to sue the ship, unless the owner is “domiciled” in England or Wales, the word domiciled is to be taken in its technical sense.

In November, 1861, A. supplied necessaries to a British ship. On the 12th of December, 1861, B. became a registered mortgagee of the ship, and A. subsequently instituted a cause of necessaries against the ship:—

Held, that the mortgage of B. had priority over the claim of A. for necessaries.

Under the 5th section of the Admiralty Court Act, 1861, the material man acquires no maritime lien, but only a right to sue the ship: his claim against the ship accrues only upon his institution of the suit, and is therefore subject to any registered mortgage at that time subsisting on the ship.

The Skipwith, 10 Jur., N. S. 445, not followed.

ON the 2nd of February, 1864, the plaintiff instituted a cause against the *Pacific*, a vessel registered in the port of London, for necessaries supplied to her whilst lying at Southampton, during a period commencing November, 1861, and ending February, 1862. The defendants intervened as mortgagees; and in their answer alleged as follows:—that they became mortgagees for the sum of 30,000*l.*, by deed dated the 12th of December, 1861, and registered on the same day; that on the 4th of October, 1863, they took possession of her as mortgagees, and that since the institution of the suit they had sold her under their power of sale for 20,000*l.*; that Clarke, the owner of the vessel, left England in August, 1862, for the purpose of meeting her at New York, and that he then intended to return shortly to England; that, at the time of the institution of the suit, he was domiciled in England or Wales, within the meaning of the Admiralty Court Act, 1861; and that the repairs, in respect of which the cause for necessaries was brought, were done upon the personal credit of the owner, and were not “necessaries” at all within the meaning of the same Act; and the answer alleged that under these circumstances the Court had no jurisdiction. The plaintiff now moved to reject the answer.

The following sections of the Admiralty Court Act, 1861 (24 Vict. c. 10) were referred to.

Sect. 5. “The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution

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March 15, 22. in England or Wales."

Sect. 11. "The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said Court or not."

Dr. *Deane*, Q.C., and Dr. *Middleton*, in support of the motion.—"Domiciled" means domiciled for municipal purposes, not for natural purposes; it is, in fact, equivalent to "resident." The object of the statute is to give a remedy *in rem* where the shipowner is out of the way.

The presumption is, that necessaries are supplied upon the credit of the ship; *Perla* (a); especially where the ship is not in a home port.

The repairs supplied were necessaries: *Comtesse de Frégevill* (b); *Webster v. Seekamp* (c).

The material man has priority over the mortgagee: *Skipwith* (d); *Wataga* (e); *Williams v. Allsup* (f). This is equitable, because the mortgagee has taken the benefit of the supply.

Mellish, Q.C., and *E. C. Clarkson*, contrà.—"Domiciled" is a well known word, and must be taken in its technical sense. The principle on which an action against the ship does not lie for necessaries supplied in a home port is equally applicable to the case of necessaries supplied upon the personal credit of the owner, as the answer avers these were, and this averment must be taken to be true.

The repairs could not be necessaries if done on personal credit.

Either of the two systems—one which always prefers the mortgagee to the material man, or one which always prefers the material man to the mortgagee—would work. But, according to the plaintiff's construction of the statute, the mortgagee would have precedence, if the owner remains domiciled here, but would lose it if the owner becomes domiciled abroad; a result which is not only unreasonable, but which would prevent the shipowner from obtaining credit either way, either from the shipwright or from the mortgagee. The statute did not mean to alter the priorities of claims against the ship: it simply gave

(a) *Swabey*, 353.

(b) *Lushington*, 329.

(c) 4 B. & Ald. 354.

(d) 10 Jur., N. S. 445.

(e) *Swabey*, 165.

(f) 10 C. B., N. S. 417.

the material man a new remedy in the right to sue the ship; it left the position of the mortgagee untouched; that position was, before the statute, superior to the mortgagor's assignees in bankruptcy; Merchant Shipping Act, section 72; and to execution creditors: *Dickinson v. Kitchen* (a).

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The material man has no maritime lien: he takes subject to existing circumstances.

Dr. *Deane*, Q.C., replied.

Cur. adv. vult.

DR. LUSHINGTON.—The Court cannot attribute to the word “domiciled” used by the legislature any other than its known legal sense, even though such a construction may narrow the operation of the statute. I must, therefore, hold that if the ship-owner be only temporarily absent from this country *animo revertendi*, no action by the material man will lie against the ship.

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Judgment.
“Domiciled”
is to be under-
stood in its
legal sense.

Then, as to the second question, the order of priority between the mortgagee and the material man, I think I shall be able to deal with it most satisfactorily, if, in the first instance, I consider the position of each separately. The essential element of a mortgage is the security. The mortgagee may take the covenant of the mortgagor, but this is only as collateral security; what he mainly relies on is the ship as the security. As soon as the deed is registered, his right to his security is fixed, and no subsequent act of any third person can displace it, except a lien entitled to precedence. Whether a material man has a maritime lien shall be presently considered. This position of the mortgagee of a ship, that of a secured creditor, has been always recognized in the Courts of Common Law, as was pointed out in the argument; it is now fully established in the Admiralty Court also, for by the 11th section of the Admiralty Court Act, 1861, the Court has jurisdiction (to be exercised *in rem* or *in personam*) over any claim of any mortgagee duly registered. The material man, by the law of some countries, has a lien upon the ship, and in very early times he could maintain a suit against the ship in the Admiralty Court. But the decision of the Privy Council, in the case of the *Neptune* (b), given in the year 1835, took away the last vestige of Admiralty jurisdiction in the case of necessaries; and from that date till the recent statutes, the material man had no locus standi whatever in the Admiralty Court. His only remedy was in the Common Law Courts; and there, unlike the mortgagee, he could proceed only against the shipowner, not against the ship. This state of things was altered by the 3 & 4

(a) 8 Ell. & Bl. 789.

(b) 3 Knapp, 94.

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The 5th section of the Act confers no maritime lien, but only a right (under conditions) to sue the ship.

The merchant suing the ship, sues the ship subject to any registered mortgage.

Vict. c. 65, s. 6, which gave the Court jurisdiction over claims for necessities supplied to a *foreign* ship; but that statute not applying to British ships, the 24 Vict. c. 10, s. 5, gave jurisdiction over claims for necessities supplied to any ship, subject to two provisoes—that the supply should have been made elsewhere than in the port to which the ship belongs, and that at the date of the institution of the suit the shipowner should not be domiciled in this country. These enactments may seem diverse, but the reason for them is plain and uniform. Against the foreign vessel, a real action is given to the material man in all cases, because the owner is assumed to be beyond the jurisdiction. And it is also denied against a British vessel, in case the necessities have been supplied in the home port, because the presumption is that the supply was made upon the personal credit of the owner, who would there be known and trusted. In short, the remedy against the ship is given only where a personal action against the owner would be fruitless; and not even then, where the supply is to be assumed to have been made on his personal credit. The material man, therefore, by the mere fact of his supplying necessities, in no case obtains the ship as a security until he institutes his suit in this Court; and, in the case of a British ship (like the present), he may never obtain it at all, if, by reason of the owner having a domicile in this country, the suit cannot be instituted. This, I think, shows that the material man has not a maritime lien; for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court.

Applying these observations to the present case: on the 12th of December, 1861, the defendants, by registering their mortgage, acquired the ship as a security; and at that time the plaintiffs, though they had supplied necessities, had not instituted a suit, and therefore had no lien upon the ship. On the 4th of February, 1864, the plaintiffs arrest the ship and thereby acquire the *res* as a security; but this *res* was then subject to the mortgage of the defendants. Under these circumstances, the plaintiffs must take the ship subject to the incumbrance upon it, unless the Act clearly prescribes that the claim of the material man shall override that of the mortgagee. But of this there is no trace in the Act.

It was urged that the Court will follow equitable principles in determining the priority of incumbrances, and that the mortgagee, if he has had the benefit of the supply of necessities, must be postponed to the material man, in the same way as in bottomry the first bondholder ranks after the second. This argument is not without weight; for in deference to this prin-

ciple, the law of several countries gives to the material man a lien upon the vessel. But the answer is, that this was not the view of the British Legislature as expressed in this Act. The Act, as I have before stated, gives no lien to the material man, but only a right to proceed against the ship. For these reasons, I must hold that in this case the mortgagee is entitled to be paid in preference to the material man. I should add, that I dissent from any observations in my judgment in the *Skipwith* (a) which may not be reconcilable with this judgment.

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Burchett, proctor for the plaintiffs.

Cotterill & Sons, solicitors for the defendants.

In the Privy Council.

Present—LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THE HASWELL.

Collision—Pleading—Evidence—Allegata et probata.

In a cause of collision the plaintiff is only entitled to recover *secundum allegata et probata*.

Where the plaintiffs pleaded that the collision was caused by the defendants' vessel having "suddenly put her helm a starboard;" and the evidence given in support of the petition was, that the collision was caused by the defendant's vessel having ported, instead of continuing her course under a starboard helm:

Held, by the Court of Appeal, affirming the judgment of the Court below, that the evidence could not be applied to the statement in the petition, and that the plaintiffs therefore were not entitled to recover.

Appeal dismissed, but without costs.

THIS was an action brought by the owners of the steamship Stockton against the steamship Haswell in respect of a collision which occurred between the two vessels off Coal House Point, in the River Thames, about 11.30 P.M. on the 22nd of January, 1863. Both vessels were on a voyage from the North to London.

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(a) 10 Jur., N. S. 445.

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The petition was as follows:—

1. The said ship or vessel, Stockton, is an iron screw steamer of the burthen of 450 tons, belonging to the port of Stockton, in the county of Durham, and at the time of the collision herein-after mentioned was manned by a crew of fourteen hands exclusive of her master.

2. That on the 21st day of January, 1863, the Stockton left the port of Stockton aforesaid, bound for the port of London, laden with a cargo of iron, lead and other merchandise.

3. That about 11.30 p.m. of the 22nd day of January, 1863, the Stockton in the prosecution of her said voyage while off the Lower Hope Point in the River Thames passed the said steamship Haswell, which was also bound for the port of London.

4. That the night was dark and cloudy, and the Stockton's proper lights, to wit, a bright light at the mast head, a green light on the starboard side, and a red light on the port side, were burning brightly, and so continued until the time of the collision hereafter mentioned.

5. That when the Stockton had arrived abreast of Coal House Point in the River Thames, the wind at the time blowing a fresh breeze from the west-south-west, and the tide being half flood, her engines were at half-speed and her helm was put hard a-port for the purpose of bringing her up on the north side of the river, below Coal House Point.

6. That when the helm of the Stockton was put hard a-port she was heading south-west, and she continued at half-speed, until her head came round to north-north-west, when her engines were stopped, she having sufficient way on her to take her to the north shore.

7. That when the Stockton's helm was put hard a-port, the three lights of the Haswell were plainly seen by those on board the Stockton about a quarter of a mile below the Stockton, but when the engines were stopped, the starboard light of the Haswell disappeared, and as she was fast nearing the Stockton, the master of the Stockton when she was about 200 or 300 yards distant hailed her to reverse her engines, but she nevertheless continued her course, until she came to about 50 yards from the Stockton, when she suddenly put her helm a-starboard, and immediately after ran into the starboard side of the Stockton, which at the time was motionless, and without any way upon her, about 65 feet from her taffrail, cutting through three plates of her side, her covering board and three planks of her main deck, carrying away her starboard main rigging and doing her other considerable damage.

8. That the master of the Stockton, finding that she was

making water fast, ran her ashore on the south side of the Lower Hope, and having stopped the leak as well as he could and got her afloat again he proceeded towards Gravesend, where the Stockton arrived at about 2 a.m. of the 23rd day of January, 1863, and shortly afterwards proceeded up the river, and arrived at her discharging berth at 2 p.m. of the same day.

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9. That the aforesaid collision, and the loss and damage consequent thereon, were occasioned solely by want of skill or the negligence or other misconduct on the part of those on board and in charge of the Haswell, and especially in their not having kept out of the way of the Stockton, as they ought to have done, and no blame whatever in respect thereto is imputable to the master or to any of the crew of the Stockton.

The answer on behalf of the Haswell alleged in substance, that about a quarter past eleven P.M. of the said 22nd of January, when abreast of Lower Hope Point, going at half-speed only, she was overtaken and passed on her (the Haswell's) port side by the Stockton, both vessels then heading about S.W.; that there was a great number of vessels at anchor along the north side of the Lower Hope Reach, which rendered it necessary for all vessels passing either way to keep towards the south shore; that both the vessels continued the same course for about a mile after the Stockton had passed the Haswell, in the course of which the Stockton was carefully watched by those on board the Haswell, and was observed to have slackened her speed, as she did not continue to gain on the Haswell as she had done before; that in consequence thereof, the master of the Haswell caused her engines to be stopped once or twice to let the Stockton get well a-head, in order that no mischief might happen if the latter vessel should have to port her helm; that as the Haswell got nearly abreast of Coal House Point she altered her course two points, viz., to W.S.W., so as to turn the point before making her course through Gravesend Reach. That after this alteration the Stockton was about four points on the port bow of the Haswell, and about 150 yards distant from her. That the helm of the Haswell was then steadied, and about a minute or two afterwards the helm of the Stockton was also put to port. That those on board the Haswell at first thought that the Stockton was also making a course for the Gravesend Reach; but finding that she continued under a port helm until her green light opened, and she was two points on the port bow of the Haswell, at a distance of fifty yards, they immediately stopped her engines, and put her helm to starboard in order to pass astern of the Stockton; but that almost immediately afterwards, perceiving

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that she would not pass clear (in consequence, as it now appears, of the Stockton having suddenly stopped her engines), those on board the Haswell reversed her engines full-speed and put her helm hard a-port. That, nevertheless, before sternway could be got on her against the flood-tide, the stem of the Haswell struck the starboard side of the Stockton a little abaft the midships, and the Stockton, apparently under her port helm, came down the starboard side of the Haswell, went under her stern, and ran aground on the south shore.

At the hearing of the cause in the Admiralty Court on the 9th July, 1863, Andrew Spence, the master of the Haswell, was called in support of the petition, and in the course of his examination in effect stated,—that after the Haswell had starboarded her helm (as alleged in the seventh article of the petition), she ported when at a distance of about twenty or thirty yards from the Stockton, and that, in his opinion, it was this that caused the collision; and that had the Haswell continued under the influence of her starboard helm, she would have avoided the Stockton and gone astern of her. No other witnesses were called, and

Brett, Q.C. (Dr. *Spinks* with him), for the defendants, submitted that the case of the plaintiffs, as made out by such evidence, was entirely at variance with that set up in the petition; and that unless it was intended by further evidence to alter the state of facts deposed to by Andrew Spence, the plaintiffs could not recover, as their proofs were not *secundum allegata*.

Dr. *Deane*, Q.C., and Dr. *Wambey*, for the plaintiffs, contra.

Judgment.

DR. LUSHINGTON.—I never remember in the course of my experience an objection of this kind having been raised at this stage of the cause; but there is no reason, if the objection can be supported on legal grounds, why it should not be urged upon the Court at the close of the plaintiffs' case. The question, I apprehend, which I now have to decide is this: assuming the case of the Stockton to be that given in evidence by her master, whether it be good, or whether it be bad, is this case covered by the seventh and ninth articles of the plaintiffs' petition, for these are the only two articles which now require consideration.

Now as I understand the case made by the master of the Stockton, it is this,—that he purporting to cross over from the south to the north shore, and to anchor his vessel just below the Coal House Point, and perceiving the Haswell to be dead astern of him, proceeded to port his helm and to go across; and the fault that he finds with the Haswell most explicitly is this,—that

either she did not keep her course, or that she did not starboard her helm. I think that the fault he imputes to the Haswell is in substance,—that she ported her helm, but still he says that she might have escaped the collision if she had simply kept her course; on the other hand, so far from attributing the collision to the Haswell having starboarded her helm, he distinctly states the contrary, for he says that that was the measure which she ought to have taken, and which would have avoided the collision altogether. Now that is the plaintiffs' case on the evidence.

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Now let us see what is the case as stated in the seventh article of the petition. I must admit in these matters a very considerable degree of elasticity has generally been allowed in pleading, because of the difficulty from time to time of professional gentlemen getting, or distinctly understanding, all the facts which are requisite to make out the case; and I should be most reluctant to put an end to a plaintiff's case if there were merely common and ordinary errors in the petition; but at the same time I should not be at liberty to allow a case to go on if the plaintiff's evidence is utterly irreconcilable with the case stated in his pleading. Now what is the substance of his pleading? why, that when the Stockton's helm was put hard a-port the three lights of the Haswell were plainly seen by those on board the Stockton about a quarter of a mile below the Stockton; but when the engines were stopped—that appears to have been done shortly afterwards—the starboard light of the Haswell disappeared, and as she was fast nearing the Stockton, the master of the Stockton, when she was about 200 or 300 yards distant, hailed her to reverse her engines, but she nevertheless continued her course until she came to about fifty yards from the Stockton, when she suddenly put her helm a-starboard, and immediately after ran into the starboard side of the Stockton. Now it is abundantly clear here, that the fault attributed to the Haswell is not that of having ported her helm. I think I can draw no other conclusion from this statement, but that it was intended to charge the Haswell with having continued her course, and having suddenly put her helm to starboard. Now, I am of opinion, though I say it with considerable reluctance, that the evidence cannot be made to fit with this article by any ingenuity. With respect to the ninth article, it is simply the article alleging general negligence on the part of those on board the Haswell, especially in their not having kept out of the way of the Stockton; and this is too general a charge for the point I am now considering. I am under the necessity, therefore, of saying, that the evidence is irreconcilable with

1864. the petition; upon this evidence, I cannot say that the Has-
 February 18. well has occasioned the collision in the manner stated in the
 petition. I must pronounce accordingly against the plaintiffs.

From this decision the owners of the Stockton appealed.

Dr. *Deane*, Q.C., and Dr. *Wambey*, for the Stockton, endeavoured to distinguish the case from the *Ann* (a); *East Lothian* (b).

Brett, Q.C., and Dr. *Spinks*, for the Haswell.

Judgment.

LORD KINGSDOWN, in delivering the judgment of the Committee, said:—It is not without regret that their Lordships feel themselves compelled to affirm the judgment which the Court below pronounced, but they feel it necessary to adhere to the rules of pleading which have been established, and which appear to them to be essential to the due administration of justice. They feel it impossible, as the learned judge of the Court below stated, by any ingenuity to reconcile the evidence given in the case with the statement contained in the petition; and they must, therefore, affirm the judgment. At the same time, as the effect of it may be, though their Lordships do not say that it is, to shut out the real justice of the case, they will advise Her Majesty to affirm the judgment, but not give any costs of this appeal.

Judgment
affirmed, but
without costs.

Preston & Ley, solicitors for the appellants.

Deacon & Son, proctors for the respondents.

(a) Lushington, 55.

(b) Lushington, 241.



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In the Privy Council.

Present—LORD CHELMSFORD.

LORD KINGSDOWN.

SIR JOHN COLERIDGE.

THE HAMBURG.

Bottomry-bond on Ship, Freight and Cargo—Obligation of Master to trans-ship—Duty to communicate with Owners of Cargo—Validity of Bond tried by Law Maritime—The Bonaparte, 8 Moo. P. C. 459, explained.

Where a bottomry-bond is made payable upon arrival at the ship's port of destination in England, the validity of the bond is triable by the general maritime law as administered in England, and not by the law of the ship's flag, or the law of the place where the bond was executed (a).

If there are means of repairing the ship at the port of distress, the master has no obligation to trans-ship the cargo.

The character of agent for the owners of the cargo is imposed upon the master solely by the necessity of the case. The master of a ship, therefore, has not authority to hypothecate the cargo, if in the circumstances of the case it is reasonably practicable for him to communicate with the owners before doing so; and if he hypothecates the cargo in such circumstances without so communicating, the bond, though given and taken *bonâ fide*, is not binding upon the cargo.

BOTTOMRY. This cause was instituted in the Admiralty Court by the holder of a bottomry-bond, granted by the master of the Hamburg, upon ship, freight and cargo, under the circumstances hereinafter stated. The cause went by default against ship and freight; but the owners of the cargo appeared, and contested the validity of the bond.

The Hamburg, a schooner, belonging to the port of Hamburg, in the Hanseatic League, was, while lying in the port of Greytown, Nicaragua, by a charter-party there made on the 15th of July, 1861, chartered for a voyage from Grey Town to Liverpool, the master to sign bills of lading as presented to him. On the voyage the vessel was forced to put into the island of St. Thomas to repair sea-damage. The cargo consisted of 90 tons of Brazil wood, 3 bales, 2 barrels, and 24 cases of India-rubber, 9 seroons of indigo, and 1 case of turtleshell. The vessel arrived at St. Thomas on the 25th of April, 1861. The master immediately reported himself to the Hanseatic Consul, and in all the subsequent transactions (survey, repairs and bottomry) acted under his directions, and with his public official sanction. On the day of arrival (the 25th April) the Consul appointed three

(a) See *Lloyd v. Guibert*, Law Rep., 1 Q. B. 115; *Neptune*, 3 Knapp, 115, et seq.; also *Peninsular and Oriental Com-*

pany v. Shand, 3 Moore, P. C., N. S. 272.

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surveyors, who, after survey of the ship, recommended the cargo to be discharged, in order to examine the extent of the damages the ship had received. The cargo was accordingly discharged, and on the 6th of May, after a further survey, the surveyors recommended extensive repairs to the ship, estimating the same at 4,820 Spanish dollars, not including "extra work which might be found necessary after repairs had commenced." On the same date the surveyors estimated the vessel, with tackle and apparel, in her then state, to be worth 2,000 Spanish dollars, and no more. The master meanwhile had applied for advances to the firm of Z. T. Levy & Co., of St. Thomas, by whom the ship had been chartered, on account of the owners, for the outward voyage; but they declined to have anything to do with the ship, and he then constituted the firm of Paulsen & Co. agents for the ship. The repairs ordered by the survey of the 6th May were set in hand immediately, and were completed on the 5th of July. The master then again applied to Levy & Co. to advance him money upon drafts on the owner of the ship, and also to other merchants, but without success; and on the 9th of July he advertised for the loan of 6,000 dollars on bottomry of ship, freight and cargo. The only tender made was by Bartholomei Langé, which was accordingly accepted, and eventually, on the 24th of July, Mr. Langé advanced 7,592 dollars at a premium of 33½ per cent., upon a bond of that date, on ship, freight and cargo, executed by the master, and made payable ten days after arrival at Liverpool. The bond contained the following clause:—"For the due fulfilment of the foregoing, I bottomry and hypothecate my said ship Hamburg, with her appurtenances, freight, and the cargo on board; and I confer on my said creditor all rights and privileges which the laws and customs of the sea impart to a bottomry creditor; and I submit myself, as also my said ship, with her appurtenances, freight and cargo, to the laws, statutes and usages of the sea, in truth and good faith."

The ship having re-shipped her cargo, then sailed to Liverpool, and arrived there on the 13th of August. An action was then instituted by the plaintiff, Alexander Duranty, of Liverpool, the indorsee of the bottomry bond, and the ship and cargo were arrested. Proceedings went against the ship and freight by default. The owners of cargo appeared, and became defendants in the cause. The ship was sold, and the net proceeds amounted to 503*l*. The net freight was 201*l*. The total amount of the bond, including premium, was 2,154*l*., leaving therefore, after application of the proceeds of ship and freight, a balance of 1,449*l*. unpaid. The cargo was valued at Liverpool at 895*l*. only.

The bond accordingly exceeded the entire value of the property hypothecated.

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The defendants, in their answer alleged, that, under the circumstances (of the market value of the ship, freight and cargo being so much less than the amount for which the bond was given), the master ought not to have hypothecated the cargo ; but that he ought to have trans-shipped it for the purpose of conveyance to England, or to have unshipped it at St. Thomas's, or to have awaited the orders of the defendants. They further alleged that though the owners of the cargo all resided in London, and a mail steamer ran between St. Thomas's and England regularly twice a month, yet that the master did not communicate with the defendants, or any of them, before hypothecating the cargo, as he was bound to and might easily have done.

The plaintiff, in his reply, alleged that the master, immediately on the ship's putting into St. Thomas's, placed himself in communication with the Hamburg Consul, as he was by the law of Hamburg required to do, and all proceedings respecting the vessel were under the sanction of the said Consul ; that by the law prevailing at St. Thomas's there was a lien on the Hamburg for her repairs and other necessities supplied to the vessel, and the Hamburg could not have sailed from St. Thomas's without duly paying for the same ; that, by the law of Hamburg, the master of a Hamburg vessel is not allowed to trans-ship his cargo, unless his vessel cannot be repaired ; that neither by the law prevailing at St. Thomas's, nor by the British law, nor by the law maritime, was the master, in the circumstances of this case, bound to have trans-shipped his cargo, or to have unshipped it and left it at St. Thomas's ; and that neither by the law of Hamburg, nor by the law prevailing at St. Thomas's, nor by the British law, nor by the law maritime, was the master of the Hamburg, in the circumstances of this case, bound to have communicated with the owners or consignees of the cargo before hypothecating the same. These allegations were put in issue by the defendants in their rejoinder.

From the evidence in the cause it appeared that, during the stay of the vessel at St. Thomas's (25th April—24th July), the master had not made any attempt to communicate with any of the consignees of the cargo. In his examination he deposed that he was not aware of any such obligation, and that he had done as the Consul had directed him, and that he did not in fact know the addresses of all the consignees. The owners of the cargo (the present defendants), it appeared, were three firms ; viz., Judah Hart & Co., J. C. White & Son, and Frühlings & Göschen, all of London. There were in all seven different bills of lading for the cargo. All made the property deliverable in

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Liverpool; five (Juan de Mesnier and Miguel Cordeirolo, shippers) made the property named, Brazil wood, &c., deliverable to J. Hart & Co. or assigns; one (De Barruel, shipper), made thirteen cases of India-rubber deliverable "to Messrs. J. C. White & Sons or their assigns;" and one (Julius Wolf, shipper) made 830 sticks Brazil wood deliverable "unto order or assigns;" this last bill of lading was subsequently, and without the knowledge of the master, indorsed to Frühling & Göschen. Of each of these bills of lading the master had a duplicate on board in his possession.

The average length of the passage for mail steamers between St. Thomas and England is fourteen days. While the Hamburg was at the island, the mail steamers left St. Thomas for England, on the 29th April, 14th May, 29th May, 13th June, 29th June, 15th July; the mails were due in London on the 14th and 29th of each month; and the return mails were made up in London on the 2nd and 17th of each month.

From an affidavit of a Mr. Cameron, of St. Thomas, filed on behalf of the defendants, it appeared that, "in the month of May, 1861," a ship called the Pioneer was lying at St. Thomas bound for England, partly laden with timber; that she was unable to fill up her cargo at St. Thomas, and on the 11th of July, 1861, sailed for Santo Domingo for the sole purpose of completing her cargo there; and that she could have carried the ninety tons Brazil wood from the Hamburg. Also, that the remainder of the cargo of the Hamburg, viz., the India rubber, indigo and turtleshell, might have been sent on by the mail steamer.

On the part of the plaintiff it was proved, that the money was advanced in good faith on the current rate of bottomry, and was in fact expended on the repairs and other necessary disbursements in respect of ship and cargo. They also produced evidence that, by the law of Hamburg, the master of a Hamburg vessel arriving in distress in a foreign port, is bound to place himself in communication with his Consul, and to act in all things by his directions; that by the same law, the master had in the circumstances no right to trans-ship, and no obligation to communicate with the owners of cargo; and that the underwriters on ship in Hamburg always require the directions of the official surveyors to be followed. Evidence was also given that, by the Danish law, which prevails at St. Thomas, there was a lien on the ship for the repairs done.

The defendants on the other side produced in evidence an affidavit of Dr. Dumenberg, of Hamburg, councillor at law and jurisconsult, in which he declared his opinion to be that, by the

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Hamburg law, the master is bound to correspond with the owners or consignees of cargo before bottomry, if he has an opportunity to do so. It was also therein stated, that by the Hamburg Statute Law (Art. 3, 4, stat. p. ii. tit. 18) it was declared, that a master who wilfully takes bottomry for an amount exceeding the value of objects hypothecated without urgent necessity is to be punished, and that the owners are not liable on such a bottomry bond to a further extent than the value of the property hypothecated. But it was further enacted by the same law (Art. 3, stat. ii. 14), that in case a ship suffers damage on the course of her voyage, so as to be compelled to put into a port of distress, it is to be decided by the master, after due communication held with the owners of the cargo, whether the vessel has to be repaired and the cargo forwarded with the same, or whether the cargo has to be trans-shipped or laid up at the port of distress.

The inference drawn by the deponent from these enactments of the Hamburg law was, "that the master who repaired the vessel and hypothecated the cargo for a sum which, as he doubtless knew, would nearly double the value of the cargo when arrived at her port of destination, when the agent for the owners had refused to advance funds for the repairs, so that the master must have been aware of the sale of the vessel becoming unavoidable, notwithstanding the bottomry, and also, besides, neglected to communicate with the owners of the cargo, acted clearly contrary to the interests of the cargo and thereby violated his duty as agent of the consignees of the cargo, which would have been to trans-ship the cargo, or, if this could be done with less expenses to the cargo than by hypothecating the same, to warehouse it at St. Thomas's, or at least to communicate on the subject with the consignees."

The cause came on for hearing in the Admiralty Court on the 24th March, 1863.

Milward and *Lushington* for the plaintiffs.—Upon the survey of the 6th May, the master had to make up his mind what to do. There is no proof that at that date there was opportunity to trans-ship. But in no case is there an obligation on the master to trans-ship: *Gratitudine* (a); *Shipton v. Thornton* (b); *Lord Cochrane* (c); *Bonaparte* (d); *Grey v. Gibbs* (e); *Matthews v. Gibbs* (f). The master on that date (6th May) elected to repair, and the repairs were immediately begun. Looking to the date

(a) 3 C. Rob. 262.

(b) 9 Ad. & Ell. 314, 332.

(c) 2 W. Rob. 334.

(d) 3 W. Rob. 308.

(e) 2 H. & N. 22.

(f) 3 Ell. & Ell. 252.

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and all the circumstances, there was no duty cast upon him to communicate with the owners of the cargo, before so commencing to repair. The *Bonaparte* (a) only decides that a bond would be bad against cargo, if before the repairs were in point of fact commenced, there was time to communicate with the owners of cargo, and the master did not so communicate. In no case has a bond been pronounced void against cargo for want of communication with the owners; the cases decided are all in favour of the bond: *Gratitudine* (b); *La Ysabel* (c); *Lord Cochrane* (d); *Cargo ex Sultan* (e); *Olivier* (f). The master knew the names of the consignees, but not their addresses; and he did not know that the consignees were the owners of the cargo. The *Oriental* (g) is the only reported case in which a bond on ship has been held bad for want of communication with the ship-owner; and the relation of the master to the ship-owner is very different from his relation to the owners of cargo. Neither is there proof that at the time of executing the bond the master, as a reasonable man, must have known that the bond would exhaust ship, freight and cargo; and the subsequent event ought not to invalidate the bond: *Gratitudine* (h). The master was bound by the Hamburg law to obey his Consul; and he did so. In all the circumstances of the case it would be inequitable that the bondholder should lose his money, which had been advanced in good faith.

The *Queen's Advocate* (Sir R. Phillimore, Q. C.) and Dr. *Tristram*, for the defendants.—The general duty of the master to communicate, or to attempt to communicate, with the owners of cargo before subjecting it to a bottomry bond is settled by the decision of the Privy Council in the *Bonaparte* (i). Here all the circumstances of the case pointed to the duty of such communication; the values of the property, the extent of the repairs, the facility of communicating by regular mails.

The authority of the master of the ship to act as agent for the cargo in a port of distress is limited by the necessity of the case, and it is only to be exercised for the benefit of cargo. The bond is bad because when made there was no reasonable prospect of benefit to arise therefrom to the owners of the cargo: *Gratitudine* (k); *Duncan v. Benson* (l). The case is governed by the law maritime: *Eliza Cornish* (m). The point still seems

(a) 8 Moore, P. C. 472.

(b) 3 C. Rob. 240.

(c) 1 Dodson, 275.

(d) 2 W. Rob. 334.

(e) Swabey, 504.

(f) Lushington, 484.

(g) 7 Moore, P. C. 398.

(h) 3 C. Rob. 265.

(i) 8 Moore, P. C. 473.

(k) 3 C. Rob. 258, 261.

(l) 1 Exch. 557.

(m) 1 Spinks, Eccl. & Adm. 45.

open, whether there may not be circumstances in which the master is bound to trans-ship; if in any case certainly in this.

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[They also commented on the cases cited by the other side.]

Lushington replied.

Cur. adv. vult.

On the 31st March, 1863, DR. LUSHINGTON gave judgment. Judgment.—This is a cause of bottomry, and the facts necessary to be stated are the following:—The Hamburg was a schooner of 50 Hamburg commercial lasts. She was proceeding from Nicaragua to Liverpool with a cargo of Brazil wood, indigo and India-rubber, and in the month of April, 1861, she put into St. Thomas for the purpose of repairing the damage she had sustained on the voyage. On the 24th July, 1861, the master executed a bottomry-bond to a person of the name of Bartholomei Langé, whereby he hypothecated the ship, her cargo and her freight for the sum of 7,592 dollars, and the bond further stipulated for a maritime interest of $33\frac{1}{3}$ per cent.; the total amount of the bottomry-bond therefore, in English money, was 2,154*l.* The ship having arrived at Liverpool in August, 1861, in the September following proceedings were commenced in this Court against the ship, freight and cargo. As relates to the ship and freight there was no defence, and the bottomry-bond holder became entitled to the proceeds, amounting to 704*l.* 17*s.*; there therefore was a deficiency amounting to about 1,400*l.*, that being the difference between the amount of the bond and the sum recovered from the ship and freight. For this difference the bottomry-bond holder seeks to render the cargo responsible. The owners of the cargo deny the validity of the bond, and they set forth various circumstances upon which they rely as proving that in law the bond cannot be sustained.

Before I commence a consideration of those circumstances, I think it expedient to state that I shall govern my judgment by reference to the ordinary maritime law. I am well aware that much has been said upon this subject, and that many questions have been discussed, whether the law of the country of the vessel ought or ought not to prevail, and also whether the *lex loci contractus* ought not to be the governing principle. I abstain, however, from going into these questions, and for the following reasons:—In the case of the *Gratitudine* (a), an imperial vessel, in that celebrated judgment where Lord Stowell exhausted all the authorities, not a word is said, nor any authority cited, to show that any law should be applied to the case save the

(a) 3 C. Rob. 240.

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ordinary maritime law. There is nothing mentioned of the *lex loci contractus*, nor of the law of the country to which the ship belonged. The same observation applies to the case of the *Bonaparte* (a), a Swedish vessel, and to many other cases. In this case, therefore, and for the present, I must take as my guide the ordinary maritime law. The state of the pleading also is so vague, and the evidence so loose and unsatisfactory, that I can take no other course. Whenever any specific law is averred to be the governing law, with sufficient distinctness, and proper evidence produced, I shall be ready to consider the question.

I now come to examine the facts alleged by the owners of the cargo as reasons for the invalidity of the bond: I may dispose of some of them in a very few words. It is quite clear that the firm of Levy and Company refused to interfere in the concerns of the vessel, and left the master to his own resources. I think, also, that there is no reason to conclude that the sum mentioned in the bond was not expended. These objections cannot be maintained.

The two main objections to the bond are as follow:—The first objection is, that considering the value of the entire property, it was wholly inexpedient and improper to have incurred the expenses which led to the bond: that the master ought to have trans-shipped the cargo to England, or to have unshipped it at St. Thomas, and to have awaited the orders of the owners. The second point, upon which the main reliance has been placed, is, that considering the values of the ship, cargo and freight, the master, before incurring those expenses, and signing a bottomry-bond, which bound the cargo as well as ship and freight, ought to have communicated with the owners of the cargo in England, or, at least, attempted so to do. The reply to these averments on the part of the owners of the cargo is, that the master acted under the advice and control of the Consul of Hamburg, and that he was bound by the law of Hamburg so to do; that by the law of St. Thomas's there was a lien on the ship for the sums expended; that the cargo belonged to various parties in England, of some of whom the master was ignorant; that neither by the law prevailing at St. Thomas's, nor by the law of Hamburg, nor by the British law, nor by the law maritime, was the master bound to have communicated with the owners or consignees of the cargo before hypothecating the same. This recital I have made includes matters which I consider I have already disposed of.

I think it is not necessary to expend much time upon the

(a) 8 Moore, P. C. 459.

question of trans-shipment, because I am not aware that either by the law of England, or by any other law applicable to this case, was the master bound to trans-ship. I think there is sufficient to satisfy my mind that the master might have trans-shipped; but the only effect to be attributed to that evidence is, that it was inexpedient as regards the interest of the owners of the cargo, that the master, having an opportunity to trans-ship, should sacrifice the interest of the owners of the cargo by expending such large sums on the repairs of the ship.

Then as to the further facts of this case, it is not alleged on behalf of the bondholder that the master attempted to hold any communication with the owners of the cargo, or that the merchant who took the bond made any inquiry on the subject; indeed, if the master had made or attempted to make such communication, the advance of the money upon bottomry would not be prejudiced by reason of the merchant's neglect to make such inquiry.

I have already said I must take the law which ought to be applied to this case to be the maritime law as administered in England; it is now my duty to inquire what the law is as regards the present case, and one of the chief objections offered to this bond. I apprehend that the leading authority is the case of the *Bonaparte*, to which I have already referred. It is useless to go back to prior cases, or to inquire what the law was supposed to be before that decision. Suffice it to say, that the judgment in the case of the *Bonaparte*, having emanated from the highest tribunal, must be held to have settled the law, and that the only inquiry open to this Court is to ascertain the true meaning of that decision, and then to examine whether the circumstances of this case bring it within that decision. Their Lordships state in substance that before the master executes a bottomry bond binding the cargo it is in general his duty to communicate with the owners of the cargo, or to attempt to do so. They state that this is not a universal rule but a general rule. The consequence of this judgment is, that in all cases where the owners of the cargo contest the validity of the bond, upon the ground that the master did not communicate with them, this Court must determine whether the circumstances constitute an exception to this general rule. It is not denied in the present case that there was no such communication, or attempt at communication. In considering what can constitute an exception, extreme difficulty and uncertainty, rendering the success of the attempt to communicate almost hopeless, must, I conceive, have that effect; also the urgency of the occasion not admitting of any delay. There may, no doubt, be many other circumstances which ought

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to operate on the mind of the master when he has to determine whether he will execute a bottomry-bond binding the cargo, and what circumstances may render a communication with the owners more or less necessary. I am exceedingly anxious in applying that rule to take as correct a view as possible of the facts which will constitute an exception, for it is obvious that by undue rigour in enforcing the rule, great loss may without blame arise to him who advances the money on bottomry, and the general validity of bottomry-bonds may be to a certain extent affected to the injury of commerce. The rule by which the Court must now be guided is certainly not generally known in the various countries where bottomry-bonds are most usually taken. The ancient rule was that the person who advanced money on bottomry was only bound to inquire into the apparent necessity of the case, and to ascertain that the money could not be had on personal security ; indeed, a large proportion of the bonds were granted in consequence of advertisements, and the lender under such circumstances made no more than the usual inquiries. In the great majority of cases the lender had no opportunity of knowing more than what the master told him. It is most desirable therefore, as the lender will now lose his security on the cargo, if notice has not been given to the owner of the cargo before the bottomry-bond is executed, that he should know what information to require from the master on that head. It is impossible to define what information the person who intends to advance money upon the security of the cargo must require beyond this,—that he must ask whether communication has been had or attempted with the owners of the cargo, and if not, why not ? And he must govern his conduct as well as he can by the information he receives.

Upon this state of facts the non-communication, or absence of attempt at communication being admitted, what is there in this case to amount to a justification ? Here perhaps it may be convenient to state, according to the evidence of a gentleman who has made an affidavit in this case, what is the course of the post. The Hamburg arrived at St. Thomas on the 25th April, 1861. There was a mail to England every fortnight, occupying fourteen days each way. The mails left St. Thomas April 29th, May 14th, 29th, June 13th, 29th, and arrived at various dates which I need not specify, but they left London on May 2nd, 17th, June 2nd, 17th, and the bond was granted July the 24th.

Now the evidence shows therefore that the vessel arrived before the 29th April, when the mail left. Indeed, on or about the 25th April, the master very properly resorted to the house of Levy and Company, who had formerly chartered the ship. They

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refused altogether to render him any assistance; from them he could expect no advance of money, neither had he any credit with any other house. All this he must have known very soon after his arrival at St. Thomas. He knew therefore that for repairs and expenses he must obtain money on bottomry, and though he might not know the precise extent of the damage done to the vessel, he must have been aware that he could not raise sufficient money to pay for repairs and expenses without subjecting to bottomry the cargo as well as the ship. He must have known the ship was of small value.

Now, what is said in excuse? It was argued, and very fairly argued, that if the master attempted to communicate with the owners of the cargo, still it would be very doubtful if he could in any reasonable time have received an answer. This is true; but what says the judgment of the Judicial Committee?—that there should be, if practicable, an attempt to communicate. Certainly, looking at the dates, this was not impracticable. As to the alleged ignorance of the master as to who were the owners of the cargo, I am of opinion that, with the bills of lading before him, that with inquiry of Messrs. Levy and Company, or of the British consul or Lloyd's agent, he would not have experienced any difficulty in ascertaining the addresses of at least some of them. With regard to any urgency to commence or finish the repairs, no doubt it was most desirable to complete the voyage; but looking at the nature of the cargo or principal part of it—wood—not of a perishable nature; it is, I think, impossible to say that there was any extraordinary urgency. It is true that the master was not bound to trans-ship the cargo according to the principles laid down in the *Gratitudine*(a). The distress of the adventure constituted the master to a certain extent agent for the cargo. Though this is undoubtedly true, yet I think it is qualified by imposing upon the master the duty of protecting the interests of the owners of the cargo, and this consideration brings me to direct my attention to the argument so strongly urged by her Majesty's advocate. Quoting from the judgment of Lord Stowell, in the case of the *Gratitudine*, he contended that the master had no right to hypothecate the cargo in cases where there was no benefit or prospect of benefit to arise to the owners of the cargo from such hypothecation. That proposition is no doubt true, but it is a case which will not often occur.

It is therefore my duty to examine the facts of the present case, in order to discover whether there was any, and what, prospect of benefit from the execution of this bond likely to arise to the owners of the cargo. The bond, including interest, is

(a) 3 C. Rob. 262.

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 March 16. 560*l.*,—that is the sum for which it is sold here; before the
 repairs, therefore, it was much less,—it could not have exceeded
 300*l.* The freight is 201*l.* 12*s.* 10*d.* The master must have
 known, though perhaps not with absolute precision, what was
 the value of the ship, but taking the value of the ship as re-
 paired, and the amount of freight together, the whole sum total
 is about 761*l.* 12*s.* 10*d.* The master must have known that the
 whole remainder of the amount secured by the bond, viz., about
 1,400*l.*, must fall upon the cargo. But the cargo has sold for
 895*l.* It might be that the master had not any accurate know-
 ledge of the value of the cargo. This may be so, but I think it
 also true that by a very little inquiry he might have arrived at
 an approximate value of the cargo, so as to have formed some
 judgment as to the effect of the bottomry-bond on the owners of
 the cargo.

Now here was a very large margin, and even if the cargo had
 been estimated at half as much again as it sold for, still the
 whole would have been exhausted, and nothing left for the
 owner. In this state of circumstances, surely the master, acting
 for the interests of the owners of the cargo, should have paused
 before he consigned their property to total destruction. It is
 impossible to conceive a stronger case requiring communication
 with the owners of the cargo, or at least an attempt to have such
 communication.

On a review of all these circumstances, and looking to the
 rule laid down by the Judicial Committee, I cannot come to the
 conclusion that the facts of this case form any exception, such as
 was contemplated by their Lordships, and as might under an
 extraordinary combination of facts occur. I must, therefore,
 adhere to the rule, and hold that this bond is invalid as relates
 to the cargo. I have entered more at length into the facts of
 this case and the principles upon which it ought to be decided,
 because I believe that the rule applicable to these cases has not
 been generally known. I must admit my own ignorance of it,
 though I had searched every reported case, and I was not ig-
 norant alone; for Lord Cottenham, after time had been allowed,
 and strict examination made for every inquiry, declared he was
 not satisfied that any such rule ever existed. That was his
 judgment in the case of *Glascott v. Lang (a)*. But the necessity
 of communication, or attempt at communication, is now the
 established law by which this Court must be governed, and it is
 of the last importance that this rule should be generally known,
 for the government of masters in subjecting a cargo to bottomry,

(a) 2 Phillips, 310.

and for the purpose also of warning those who advance money upon bottomry of the vital importance of making due inquiries. I must pronounce against the bond, so far as it regards the cargo, with costs.

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This judgment was appealed against.

Milward and *Vernon Lushington* for the appellant.—There were three objections to the validity of the bond as against the cargo made by the respondents in the Court below.

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- (1) That considering the total value of the ship, freight and cargo, compared with the amount of the money required for the expenses at St. Thomas's, the master was not justified in subjecting the cargo to the bond.
- (2) That the master of the ship had not communicated, or attempted to communicate, with the respondents before hypothecating their cargo.
- (3) That the master had had opportunity of trans-shipping the cargo at St. Thomas's.

As to (1) we say that the conduct of the master at St. Thomas's, at the time he ordered the repairs (6th of May, 1861, or at the time he gave the bond, 25th July, 1861), cannot be fairly tested by the results of a forced sale of the property at Liverpool in August following.

Again, the fact of the appellant accepting the property as his only security for the repayment of the money advanced by him is strong evidence that the value of the property did not appear manifestly inadequate to meet the bond. And if this be the case, as we say it is, is the security of the appellant who advanced his money *bonâ fide* to be destroyed?

Further, the doctrine cannot be sound that a bottomry-bond cannot be enforced against the property of the principal, whether owner of ship or owner of cargo, merely because, looking to the value of the property and the amount of the bond, the agent, the shipmaster, exercised an unreasonable discretion in hypothecating. The doctrine, if true, must apply to the owner of the ship as well as to the owner of cargo, for the master is the agent of either to hypothecate by the policy of the law arising out of the circumstances. Yet there are from time to time many cases in the Admiralty Court of bottomry-bonds on ship, freight and cargo, in which the bond not only does exhaust the ship and freight, but must have been contemplated from the first as likely to exhaust them; and these bonds are enforced against the ship and freight and against the cargo. If

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the alleged doctrine were true, the owner of cargo, appealing to the law, that ship and freight must be exhausted before the cargo can be resorted to, might repudiate it also.

As to the 2nd objection, we say, that under the circumstances of the case there was no obligation on the master to communicate with the owners of cargo. The duplicate bills of lading in his possession gave him no sufficient information as to who were owners. On the other hand, the respondents had notice of the ship having put into a port of distress, and gave no evidence that if applied to they would have advanced money to assist in forwarding the cargo. Nor could an answer to a communication have been obtained in any reasonable time. The survey on which the repairs were ordered took place on the 6th of May, 1861, and the earliest possible reply to any communication about that survey would have been on the 15th of June.

Again, we have express evidence that under the law of Hamburg there was no such obligation upon the master. The counter-evidence contained in the affidavit of Dr. Donnenberg is unsatisfactory, and moreover does not even purport to prove that by the law of Hamburg the lender's security could be void.

Article 3, Part II. Title 14, of the Hamburg Statute Law (A.D. 1771), to which Dr. Donnenberg refers as enacting that it is the duty of the master to communicate with the owners of the cargo, is correctly translated as follows :—

“ In case a ship should suffer damage, and the merchants, the helmsman, and the greater part of the crew should be of opinion that it might be repaired, the captain is bound to get the ship repaired and mended in the very same place, and to bring the merchandise of the merchants to the places unto which he has promised to take it, if God preserves him from misfortune. But, in case the ship may not be mended, the captain then shall transfer the goods to other ships lying at the place, for account and risk of the merchant, in which case he is entitled to the whole of his freight. If, however, the captain cannot find any other vessel, or if he is prevented by other legal reasons, by bad weather and contrary wind, he shall store the goods safely, for account and risk of the merchant, and shall receive his freight in the same place, *pro rata itineris*.”

The merchants herein mentioned, it is submitted, mean the merchants being actually on board the ship with their goods, such being the custom according to the simplicity of ancient commerce (*Gratitudine (a)*), and provision being made in many

(a) 3 C. Rob. 267.

codes for their consultation in emergencies, as jettison and the like.

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The case of the *Bonaparte (a)*, on which the judgment in the Court below is founded, proves, on careful examination of the circumstances, only to decide positively that a bond may be invalid against cargo if the master has a considerable interval to communicate with the consignees of the cargo between the time of the vessel arriving in the port of repairs and the time when the repairs are actually commenced. In the present case no such interval occurred.

The relation of the master of a ship to the consignees or owners of the cargo is very different from his relation to the shipowner, more especially as concerns the duty of communication before granting a bottomry bond. The shipowner is the master's proper constituent and correspondent; the master knows his address, is bound to follow his instructions, and at all convenient opportunities to furnish him with full information, and seek his advice. The shipowner is also bound by his contract with the freighters to furnish the master with all necessary supplies to enable the ship to accomplish the voyage. On the other hand, the fundamental duty of the master towards the consignees of cargo is to carry on the cargo to destination as soon as possible, in the ship in which it was laden. Of the value of the cargo the master is imperfectly informed, still less does he know the measure of importance of an early arrival, in any particular case, but he knows the general importance of an early arrival, and that delay may lose a market, or cause a breach of contract. Above all, the master has in general no duty to correspond with the owners or consignees of the cargo. Bills of lading, from which he derives his information, are often to "shipper's orders," naming no consignees; but if consignees are named, their places of abode and business, and other circumstances, are generally unknown to the masters. The consignees may be many in number, and they may be bare consignees, having no property in the goods consigned to them, and no authority save to receive them: in any case, they have no duty to advance money to the shipowner or the master (save by special contract), and if applied to by the master for that purpose, or for directions, they may send no directions and no supplies, or insufficient directions and insufficient supplies, or may send conflicting directions as to selling, trans-shipping or hypothecating the goods, or leaving them at the port of distress. Moreover, any mere attempt to communicate with distant con-

(a) 8 Moore, P. C. C. 459.

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signees not ending in actual and satisfactory communication has for a result simple waste of time. These circumstances, which are commented upon by Lord Stowell in the *Gratitudine* (a), and by the present learned Judge of the Admiralty Court in the *Vibilia* (b) and the *Olivier* (c), together with the fact, that if cargo is hypothecated in part for ship's expenses, and freed to pay such part of a bond, the owners of the cargo are entitled to recover all monies so paid from the shipowner (*Duncan v. Benson* (d)), it is submitted, ought to limit, and in fact do limit by the maritime law of all civilized states, the actual duty of the master to communicate with the consignees of cargo to a few rare and peculiar cases; and upon such conception of the law bottomry transactions have hitherto been founded. To these considerations it is to be added, that a lender on bottomry security, who is an entire stranger to the owners of cargo, has no means of ascertaining that the master has had means of communicating with the owners of cargo, or has neglected or availed himself of the same, except by inquiry of the master, and that such inquiry is futile when the advertisement for bottomry is issued (as in the present case) after all the expenses in respect of ship and cargo have been incurred, and when neither ship nor cargo can leave the port of distress until such expenses are paid.

In the present case it was proved that by the law of St. Thomas there was a lien on the ship for all ship's expenses; and a lien upon cargo for warehouse rent obtains by general custom in all known jurisprudence.

As to the third objection, that the master might and ought to have trans-shipped, the only evidence adduced to show any opportunity to trans-ship the cargo was the passage (e) from the affidavit of Mr. Cameron.

This statement as to the *Pioneer*, into the truth of which the appellant had no opportunity to inquire, may well apply to the end of May, 1861, long after the repairs of the *Hamburg* had actually commenced.

The plaintiff had, moreover, alleged in his reply, that by the law of Hamburg the master of a Hamburg vessel is not allowed to trans-ship his cargo unless his vessel cannot be repaired, and that neither by the law prevailing at St. Thomas, nor by the British law, nor by the law maritime, was the master, in the circumstances of this case, bound to have trans-shipped his cargo, or to have unshipped and left it at St. Thomas.

(a) 3 C. Rob. 241.

(b) 1 Wm. Rob. 10.

(c) Lushington, 487.

(d) 1 Exch. 537; 3 Exch. 644.

(e) Ante, page 256.

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The plaintiff gave evidence of the law of Hamburg on this point, and the learned Judge of the Court below held, in his judgment, that there was not, by the law of England or otherwise, any obligation on the part of the master to trans-ship. We therefore submit, that no reasonable opportunity of transshipping the cargo, or wilful negligence of such opportunity, was proved; that there was no obligation on the part of the master to trans-ship; and that in any case the appellant, who advanced his money in good faith on the 24th of July, 1861, cannot have his security of that date affected by any default on the part of the master in not transshipping in the May previous.

It is also shown by the evidence, uncontradicted on the part of the respondents, that by the law of Hamburg the master of a Hamburg ship, putting into a foreign port in distress, is bound to obey the directions of the Hanseatic Consul in respect of all extraordinary measures touching ship and cargo. It is evident that not only the master of the Hamburg, but the lender of the money, acted in reliance upon such obligation.

The appellant also gave evidence, that by the law of Hamburg the master of a ship is bound, on putting into a port of distress, to follow the direction of the official surveyors, and that, if they recommend the ship to be repaired, and the master, contrary to such recommendation, sells the ship, the shipowner cannot recover against his underwriters. The respondents, therefore, having taken indorsements of bills of lading of cargo carried by a Hamburg ship had implied notice of such law, and are bound thereby in respect of the bottomry bond. On this ground also, therefore, the master acted rightly in repairing the ship, and in executing the bottomry bond, which should therefore be held valid.

Lastly, the general equity of the case requires that the bond should be upheld. The appellant advanced his money in good faith, in the ordinary course of mercantile transactions, and with ordinary and reasonable care; by means of that money considerable expenses attaching solely to the cargo of the respondents, as well as general average expenses, were defrayed, and also the cargo was brought finally to destination.

The Queen's Advocate and Dr. *Tristram* for the respondents, contra.—First, the Court below was right in refusing to enforce this bond against the owners of cargo, as it was invalidated by the want of communication or attempted communication with them before it was given. It is the master's duty, in the absence of special circumstances to make the case an exception, before hypothecating the cargo, to communicate or attempt to

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communicate with the owners of it, where there are means of communication, and he knows or can ascertain who they are, and where they are to be found. This is distinctly recognized to be the rule in the *Gratitudine* (a), a case acknowledged at common law as the leading case on bottomry: *Freeman v. East India Company* (b); *Duncan v. Benson* (c). There, Lord Stowell says (p. 273), "the Court would, undoubtedly, be very unwilling to relax the general obligation of masters to correspond with the proprietors (of cargo) where it is practicable." The same rule is also involved in *La Ysabel* (d), decided by the same Judge. The feasibility of the rule appears from the considerations that the master is not known to the consignee; he is but the latter's general agent in respect of cargo, and has no power over it except in cases of absolute necessity. And, again, the owner of cargo should have a right to check accounts affecting and payments made out of what is in fact his own money. The rule is also confirmed by the judicial committee in the *Bona-parte* (e), a decision carefully considered, and which has ever since been acted upon. The appellant now wants to reverse this rule, or that at all events it should be held inapplicable to the circumstances of this case. There is, however, nothing in them to take the case out of the general rule as laid down above. The evidence in the cause shows abundant means of communication, and the master nowhere says that he could not have learned the addresses of the owners. But it is said, that the money having been advanced bonâ fide, it is hard that the lender should lose his security. But before he advanced the money he should have satisfied himself by inquiry that the master was in a position to give a valid bond. Mere bona fides in the lender is not sufficient to make a bond valid: *Heathorn v. Durling* (f).

We also contend, that the law applicable to this case is not the law of Hamburg, but the English maritime law: *The Eliza Cornish* (g).

There is a further ground on which the bond is invalid. A master has no authority to bottomry the cargo unless where there is a prospect of benefit to the owners of the cargo. In the *Gratitudine* (h) Lord Stowell says, "In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs." This rule was approved

(a) 3 C. Rob. 240.

(b) 5 B. & Ald. 617.

(c) 1 Exch. 537.

(d) 1 Dods. 273.

(e) 8 Moo. P. C. 459.

(f) 1 Moore, P. C. 5.

(g) 1 Spinks, 36.

(h) 3 C. Rob. 261.

by the Lord Chief Baron in *Duncan v. Benson* (a). There was no such prospect here at any period of the transaction.

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Milward replied.

On the 16th of March, LORD KINGSDOWN delivered the judgment of the Committee prepared by Sir John Coleridge.—This was an appeal from the judgment of the High Court of Admiralty, which has been pronounced for the invalidity of a bottomry bond, in so far as it applied to the cargo of the ship *Hamburg*; and the question arose under the following circumstances:—

The *Hamburg* was a schooner of fifty Hamburg commercial lasts. She was proceeding from Nicaragua to Liverpool with a cargo of Brazil wood, gum, indigo and India-rubber, and on the 25th April, 1861, she put into St. Thomas for the purpose of repairing the damage she had sustained on the voyage. On the 9th July the master advertised for tenders for a loan to defray the expenses incurred for the repairs, landing and reshipping the cargo; and on the 24th July, 1861, executed the bottomry bond in question, whereby he hypothecated the ship, freight and cargo for the sum of 7,592 dollars, with a maritime interest of 33½ per cent., the total amount of the bond in English money being 2,154*l.* The ship arrived at Liverpool on the 13th August, 1861; in September proceedings were commenced on the bond; as to the ship and freight no defence was offered, and the bondholder became entitled to the proceeds of these, amounting to 704*l.* 17*s.*; this left a deficiency of 1,449*l.* 3*s.*, for which it was sought to make the cargo responsible, and that has sold for 895*l.* This sum was the matter in contest; the learned Judge decided against the claim, and the decision is now appealed against.

Facts of the case.

Two objections were made in the Court below to the claim of the bondholder, and were relied on in the argument on the appeal. It was urged, in the first place, that looking to the small value of the ship, even when repaired, together with the freight, the master was not justified in incurring expenses which led to the necessity of borrowing so large a sum, but ought to have trans-shipped the cargo; in the second place, it was contended, that considering the circumstances just stated, and some which will presently be added, it was, at all events, the duty of the master, before he incurred these expenses and signed a bond which was to bind the cargo, to communicate, or at least

(a) 1 Exch. 557.

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attempt to communicate, with the owners of the cargo in England, and to have waited at least a reasonable time for their instructions.

The facts now to be stated, which in some measure apply to both objections, but principally to the last, are these : The cargo consisted, as has been stated, of Brazil wood, gum, indigo, and India-rubber, articles not of a rapidly perishable nature ; it was consigned in different proportions to three separate houses in London ; and their Lordships are not prepared to differ from the learned Judge's opinion that the master, if he were ignorant of the addresses of these firms, had the means at St. Thomas of ascertaining them, or one or more of them, or of procuring a letter to be forwarded to one or more of them. The means of postal communication between St. Thomas and England are fortnightly ; the Hamburg arrived at St. Thomas on the 25th April, and the bond was executed on the 24th July. Mail steamers left St. Thomas for England on the 29th April, 14th and 29th May, 13th and 29th June, and 15th July, and mails for St. Thomas from London were made up on the 2nd and 17th of each of the months of May, June, and July. Had the master, even if he passed over the mail of the 29th April, written by that of the 14th May (which for anything that appears he certainly might have done), he would probably have had an answer by the mail which left England on the 13th June, and might have been expected to arrive at the latter end of that month ; and it appears that the negotiation for the bottomry loan did not commence until the 11th July. It may be added that although the master's conduct is severely reflected on as unauthorized, and wanting in good sense and consideration, no fraud or collusion is imputed to him ; indeed, he seems to have acted under advice which by the law of his country he deemed himself bound to be governed by ; a circumstance not entirely without significance as a fact, although their Lordships entirely agree with the learned Judge of the Admiralty that the case is to be decided by the general maritime law as administered in England. Lastly, no fraud is imputed to the lender of the money on the bond.

The case is to be decided by the general maritime law as administered in England.

The master had no obligation to trans-ship.

Upon this statement of facts their Lordships have to consider the propriety of the judgment. The first objection was disposed of by the learned Judge very shortly and without difficulty, and, as their Lordships think, quite correctly. The master was certainly not bound to trans-ship his cargo ; indeed, his first duty was to carry his cargo to its destination in the same bottom, unless under the greatest difficulty. The learned Judge rightly thought that the true force of this objection was not as an independent one, but that the circumstances on which it was rested might

have their weight in the consideration of the second; on which, indeed, the judgment itself, and the argument on the Appeal mainly turned.

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This brings their Lordships to the consideration of that objection, and it is impossible for them not to perceive that, in dealing with it in the Court below, it has been considered that it derived whatever weight it was entitled to from the decision of this Committee, in the case of the *Bonaparte*, reported in 8 Moore, P. C. C. 459, which it was supposed had introduced a new rule of decision into this branch of maritime law. Whether this supposition be correct or not, undoubtedly if in itself that decision was both rightly understood below, and also rightly applied to the circumstances of this case, the learned Judge could only determine the case before him as he has done. The important sentence in that judgment is to be found in page 473, and is as follows:—"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that, in general, it is his duty to do so, or it is his duty, in general, to attempt to do so."

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This sentence is followed by one which in the report is printed as follows:—

"If, according to the circumstances in which he is placed, it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt."

This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned Judge, and with a slight correction of the text it would stand thus:

"If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

That this is the true wording of the passage we have ascertained by communicating with the Lord Justice Knight Bruce, who delivered the judgment. It is a most important passage, and the complement and explanation of what goes before. The

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preceding sentence states that it is the duty of the master in certain circumstances to make or attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned Judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed.

In the rule thus enunciated their Lordships are unable to discern any novelty, either in the principle on which it rests or in its application to the case of the hypothecation of the cargo of a ship by the master.

The character of agent for the owners of the cargo is imposed upon the master solely by the necessity of the case. The master of a ship, therefore, has not authority to hypothecate the cargo, if in the circumstances of the case it is reasonably practicable for him to communicate with the owners before doing so; and if he hypothecates the cargo in such circumstances, without so communicating, the bond, though given and taken *bonâ fide*, is not binding upon the cargo.

The character of agent for the owners of the cargo is imposed upon the master by the necessity of the case, and by that alone. In the circumstances supposed something must be done, and there is nobody present who has authority to decide what shall be done. The master is invested by presumption of law with authority to give directions on this ground—that the owners have no means of expressing their wishes. But when such means exist, when communication can be made to the owners, and they can give their own orders, the character of agent is not imposed upon the master, because the necessity which creates it does not arise.

It is clear that the rule as to communication must be either that, in no case and under no circumstances, is it incumbent on the master to communicate with the owners of the cargo; or that, in some cases, and under some circumstances, it is incumbent on him so to do: either the universal negative or the particular affirmative proposition must hold, and both cannot be true, although one must be. But it has not been contended, and cannot reasonably be argued, that the first proposition is true. Where the cargo belongs to a single individual, known to the master, the ship in a port in the same country, or near to it, in which that owner is resident, the means of communication sure and speedy, the probable delay inconsiderable, the cargo not of a perishable kind, the money to be borrowed so large as to be sure to bring it within the operation of the bond, it could not be contended that the master could properly hypothecate it for the repairs of the vessel without first communicating with the owner. Equally clear it is that, where all these circumstances were reversed, no such duty would be incumbent on him. But if the first proposition be false, and the latter true, what is in effect the practical conclusion, but that the question whether a master must communicate or not, is one which can only

be decided by the circumstances in each particular case? And this, which certainly seems consistent with the principle on which, as we have already observed, the maritime law makes the master, under certain circumstances, an agent for the owner in respect of the cargo, their Lordships believe to have been recognized by Lord Stowell in the case of the *Gratitude*. This was not the precise point for decision in that case; but no one can read that admirable judgment attentively without perceiving that the duty of communication with the owner of the cargo before hypothecation under circumstances, and dependent on circumstances, was familiar to the mind of the great Judge who decided it.

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Thus in 3 Ch. Robinson, p. 259, "There are other cases also in port in which the master has the same authority forced on him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time."

Again, page 261, "Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress without an opportunity of communication with the owners or their agent—what is his duty under such circumstances?"

Again, page 262, "It cannot be said that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the consignees; the master may not know the proprietors at all, but only the consignees; they may be mere consignees and have no power to direct him, but in the single case of an actual delivery to them; if owners, they may be very numerous, for in a carrier ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all: what does the necessity of such a case offer to be done?"

Again, page 266, he answers an extreme case, put at the bar, of a valuable ship with a cargo of a considerable value belonging to Dover, being in distress at Calais, and says, "undoubtedly the master should use his utmost endeavours to correspond with the consignees or proprietors; but a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes for a fortnight or three weeks," &c.

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For these reasons, the bond in this case is invalid against cargo.

That the rule laid down in the case of the *Bonaparte* was properly applied in that case, no person who attends to the facts can entertain any doubt. There may be more doubt in the present case, but the learned Judge has examined the evidence with great care, and appears to us to have arrived at a right conclusion.

As to the supposed inconvenience of the rule, their Lordships do not forget that the lender of the money is the party interested in the event of the suit, and not the master. But there is no hardship in requiring from one who is about to advance a large sum of money under such circumstances, that he should inquire of the master whether he has communicated or made an attempt to communicate with the owners the circumstances of his distress, and what he proposes to do in regard to their goods.

And it must be remembered, on the other hand, that the owners of the goods are equally interested, and, unless communicated with, have not the same means of protecting their own interests, which the lender undoubtedly has. If it be said that a decision in their favour will tend to increase the difficulty of procuring loans in foreign ports for the repair of vessels in distress, it may also be said, on the other hand, that it will tend very much to the benefit of commerce in general, to discourage improvident or fraudulent advances.

Judgment affirmed, with costs.

Their Lordships will humbly recommend to Her Majesty that this judgment be affirmed, and the appeal dismissed with costs.

Tebbs & Son, proctors for the appellant.

Brooks & Dubois, proctors for the respondents.



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THE SERAFINA.

Bottomry for Insurance—Necessity—Maritime Risk.

The master of a ship putting into a foreign port of distress has not authority to insure the ship or freight for performing the residue of the voyage; and has no authority, therefore, to grant a bottomry bond on the ship to pay for the premiums of such insurance.

A bottomry bond, to cover payment of premiums for such insurance, stipulated that, in case of average or loss of the ship, the lender should obtain reimbursement from the underwriters, and should thence repay himself the premiums of insurance, with interest, commission and costs, holding the remainder at the disposal of the master or his principal:—*Seemle*, that such a bond was also invalid, as not being conditioned to bear maritime risk.

BOTTOMRY. The following petition was filed on behalf May 10, 24.
of the plaintiff, Vital Joseph Verbracken, a merchant of Liverpool, and agent to Messrs. P. Dasse & Co. of Havanna:—

1. In October, 1863, the Prussian barque Serafina, whilst on a voyage from Minititlan to Liverpool with a cargo of general produce, was compelled to put into the port of Havanna for repairs. Jacob Hanson, the master, being without funds or credit, the repairs were effected by money borrowed by him on bottomry security of the firm of P. Dasse & Co., merchants, of Havanna; and, as it was further necessary that the ship and freight should be insured for the said voyage to England, a second bottomry bond was entered into between him and P. Dasse & Co.: translation whereof is as follows:—

Certificate.

“Before us, consul of his Majesty the King of Prussia at Havanna, appeared Messrs. P. Dasse & Co., merchants, of this town, and Mr. Jacob Hanson, captain of the three-masted Prussian vessel Serafina, and declared as follows:—

“1. Mr. Jacob Hanson charges Messrs. P. Dasse & Co. to procure the maritime insurance on the said three-masted vessel Serafina, for the voyage from Havanna to Liverpool direct, for the sum of 3,000*l.* sterling, representing the value of the hull, keel, apparel and outfit of the said ship.

“2. Mr. Jacob Hanson further charges Messrs. P. Dasse & Co. to procure the maritime insurance for the amount of 1,050*l.* sterling, value of the freight of his cargo.

“3. Mr. Jacob Hanson binds himself to pay, fifteen days after the safe arrival of the three-masted vessel Serafina at the

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port of Liverpool, on production of the documents proving that the above sums have been properly insured to Messrs. P. Dasse & Co., or their order, the premium disbursed by them in pounds sterling, and likewise the profit of said premium, at the rate of 19½ per cent.

“ 4. In case of average or loss of the ship, Messrs. P. Dasse & Co. bind themselves to take the necessary steps to obtain from the underwriters the reimbursement of the insured sums, or corresponding indemnities, out of which they are to take the amount of premium paid by them, their charges, interest, commission, profits and costs, holding the remainder at the disposal of Capt. Jacob Hanson, or any one else having the right to claim it in his name, lieu and place.

“ Mr. Jacob Hanson binds himself to pay the amount of the premium and the stipulated profit of 19½ per cent. immediately after the extinction of the bottomry bond advanced to the same Capt. Jacob Hanson by Messrs. P. Dasse & Co., and pledges, as he declares by the present, all his goods and personal property, and the block and the keel of the above-mentioned ship *Serafina*.

“ Done in triplicate at Havanna the 11th December, 1863.

“ JACOB HANSON,
 “ P. DASSE & Co.

“ The preceding declaration has been written in our presence, and has been read over to the contracting parties, in presence of Monsr. C. E. Reutter and Monsr. Otto Merier, acting as witnesses, whose signatures and persons are known to us.

“ Done at Havanna the 11th December of the year 1863:

“ CHAS. E. REUTTER,
 “ OTTO MERIER.

“ The Consul of his Majesty
 “ the King of Prussia,
 “ LOUIS WILL.”

2. In pursuance of this agreement, Messrs. P. Dasse & Co., by their agents in Paris, caused the ship and freight to be insured, and paid as premiums the sum of 2,602*l.* 75*s.*; which, with interest at the rate of 19½ per cent., amounts to 124*l.* 16*s.* 2*d.*

3. The *Serafina* safely arrived in Liverpool on the 24th day of January, 1864, and on the expiration of fifteen days after arrival the plaintiff, being the legal holder of the bond herein sued upon, presented the policies of insurance to the said Jacob Hanson, and required payment of the said sum 124*l.* 16*s.* 2*d.*, according to the terms of the said bottomry bond, and all other conditions precedent for the payment of the said money have been performed, but no part of the said sum has been paid to the

plaintiff by Jacob Hanson, and the whole of the said sum still remains due and unpaid to the plaintiff.

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4. The Serafina has been sold by order of the Court, and the gross proceeds amount to 1,220*l.* The freight is in the registry, and amounts to 614*l.* 3*s.* 4*d.*

The petition then prayed the Court to pronounce for the bond.

Notice of motion to reject this petition was given on the part of the defendant, Carl Ritter, of Vera Cruz, the owner of the vessel.

Cohen for the defendant.—The master had no authority to give this bond; both because insurance was not a necessary expenditure, and because the covenant that in case of loss the bondholder might recoup his advances out of the insurances shows that the money was not lent by him at maritime risk. The *Boddingtons* (a) is decisive on both these points. In that case Sir Christopher Robinson confirmed a report of the registrar, disallowing an item in the bond for insuring the bond. He said, “This is a bottomry-bond, executed by the master of the ship, who has no power to bind the ship or the owner by the law of England, except within special limits—for repairs and supplies becoming necessary from the exigencies of the voyage. This is an essential principle of this species of bottomry, and the Court has hitherto acted with great strictness in not extending the privilege of bottomry against the ship beyond these limits, confining it to sums necessary for repairs, and for the furtherance of the voyage. Another essential principle of all bottomry is that maritime interest is allowed only as a compensation for maritime risk, which usually attends advances of this kind. The advance of the sum in question was not necessary for the furtherance of the voyage; nor was it made under that representation; and it is in no manner subject to maritime risk. I do not see therefore with what propriety it can be introduced into a bond that is to bear maritime interest.” It is abundantly clear that a master has no general authority to insure; a ship’s husband has none to insure for the part owners: *Maclachlan on Shipping*, p. 168. Insurance is entirely a thing for the discretion of the owners.

May 10.

Lushington, contra.—Here the bond recites that it was “necessary” that the ship and freight should be insured; and the fact so stated should be taken as admitted. The word “necessary” should also be taken in the mercantile sense of “highly

(a) 2 Hag. 422.

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expedient ;” and in this sense insurance may be as necessary as copper sheathing, new masts, or other matters, which are treated as necessary, although the voyage may possibly be performed without them. The rule requiring maritime risk as a condition in a bond does not apply to this case ; for here the *owners* were not to pay the bond if the ship were lost. It is immaterial that the bondholder covenants that, in case of loss, he may reimburse his advances out of the insurance. A decision that such a covenant is fatal to a bond would be immediately evaded by silently including the premium of insurance in the amount of the bottomry premium ; indeed, this is practically continually done. This reason goes to the first point also, and indicates that the *Boddingtons* (a) is not a sound decision.

Cur. adv. vult.

May 24.

DR. LUSHINGTON (after stating the facts set out in the petition). —The admissibility of this petition is contested, and the validity of the bond denied upon two grounds :

1st. On the ground that the master had no authority to execute a bond of such a tenor, namely, to pay for insuring the ship and freight.

2ndly. That there is no condition of maritime risk in the bond.

With respect to the first objection, the master is by law constituted the agent of the shipowner for all those matters and things which are indispensably necessary for the conduct of the transactions arising in the employment of the ship. But is insurance of the ship and freight a matter of necessity, and to be put upon the same footing as payment for repairs, indispensable equipments, and other necessities? The question is not what a prudent owner would do for the benefit of the concern. The master is invested with no such authority. In order to enable him to charge the ship by bottomry there must in all cases exist a necessity for incurring the particular expense which is covered by the bond.

I am of opinion that insurance cannot be considered a matter of that necessity. In a majority of cases it may be wise and prudent, on the part of the owner, to have his property insured ; but the advantage of insuring must depend on many circumstances, as the nature of the risk, the amount of the premium, &c. In practice insuring is not a matter usually deputed to the master ; it is that which the owners do or do not, as they think fit ; and if they do insure, they generally do it either themselves or by

(a) 2 Hag. 422.

agents expressly authorized for the purpose. This fact furnishes a 'strong argument against any implied authority on the part of the master, without instructions, to subject his owners to such an expense; and the argument is strengthened by the fact that even the ship's husband cannot, in that capacity, charge the part-owners with premiums of insurance. Upon the first point therefore I am of opinion that this bond is invalid, because the necessity which alone confers on a master the authority to bind his owner's property by a contract of bottomry did not exist.

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The other objection, that the bond does not bear the condition of maritime risk, would probably also be fatal; but on this point it is not necessary for me to express an opinion. I pronounce against the bond, with costs.

Tebbs & Son, proctors for the plaintiff.

Jennings & Son, proctors for the defendant.

THE EDWIN.

Master's Wages and Disbursements—Fraudulent Possession of Ship—24 Vict. c. 10, s. 10—Bill of Exchange.

The fact that the master was hired by one who had fraudulently obtained possession of the ship will not prevent the master having a lien upon the ship for his wages and disbursements, if he has discharged his duties in ignorance of the fraud.

The master's lien under 24 Vict. c. 10, s. 10, for disbursements on ship's account, does not include a lien for mere liabilities, as upon a bill of exchange drawn by him upon the owner and dishonoured.

The *Chieftain*, ante, p. 104, followed.

THIS case came before the Court on a motion to direct the defendant's answer to be amended in a cause of wages and disbursements, instituted on behalf of the master of the Edwin against the ship and Matthew Wilson, her owner intervening. The petition alleged in substance as follows:—

June 14.

That in September, 1863, the Edwin was lying in the port of Liverpool, under the sole control and management of Jacob Michael, as owner thereof; that the plaintiff was appointed master, navigated the vessel with a cargo to Quebec, and

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thence with a return cargo to Queenstown; that, upon his arrival there, a person claimed to take possession of the vessel on behalf of Matthew Wilson, as owner; that the plaintiff communicated with Jacob Michael, and was informed that Matthew Wilson had no interest in the vessel, and was instructed not to allow any person to take possession unless by force of legal process; that the plaintiff proceeded to Hull, and upon his arriving there in February, 1864, was forcibly dispossessed by eighty men, acting in pursuance of an alleged power of attorney from Matthew Wilson; that there was due to the plaintiff 76*l.* 10*s.* as the balance of his wages; that in the month of November, 1863, the plaintiff had made divers necessary disbursements at Quebec on account of the vessel, including insurances of the freight to be carried on the homeward voyage, amounting altogether to 480*l.*, in payment of which he had drawn a bill on Jacob Michael, who had refused to accept the same, and that the plaintiff had been sued for the said sum, and was advised that he was personally liable to pay it; and that the plaintiff had also made divers necessary disbursements on account of the vessel at Queenstown and at the Isle of Scilly, and at Deal, on his voyage from Queenstown to Hull.

The allegations in the answer of the defendant, Matthew Wilson, were to the following effect:—

In September, 1863, Edwin Holford was the registered owner of the Edwin. In the same month Jacob Michael, by fraud and fraudulent pretences, obtained possession of the ship from Holford, and induced him to execute a bill of sale thereof. This bill of sale was not to Jacob Michael, but to his son, John William Michael; but this fact was at the time fraudulently concealed from Holford. The fraud and fraudulent pretences on the part of Jacob Michael consisted, among other things, in his fraudulently giving as purchase-money for the vessel certain bills, drawn by, and in the name of John Wilson, on and accepted by W. N. De Mattos, the payment whereof would become due in January and February, 1863, and was further guaranteed by Jacob Michael, he the said Jacob Michael well knowing that neither he himself, nor John Wilson, nor W. N. De Mattos, would be able to pay the bills at maturity. The bills were all dishonoured at maturity, and Holford never received any part of the purchase-money. The bill of sale was never registered, and, by reason of the said fraud, was wholly void at law; and the possession of the vessel by Jacob Michael was without the authority of the true owner, and was wholly illegal. In the same month of September, Jacob Michael, being illegally possessed of the vessel, hired the plaintiff to act

as master; and on the 12th of September the vessel sailed for Quebec. Whilst the vessel was at Quebec, the defendant's house acted as agents for the vessel, and a cargo of timber, on the vessel's account, was there purchased by orders of Jacob Michael from the defendant's house, under an arrangement between the defendant and Jacob Michael that payment for the timber should be made by certain acceptances of the said W. N. De Mattos. The vessel sailed with her cargo from Quebec on the 27th of November, 1863. On the 7th of December, W. N. De Mattos stopped payment, and the fraud of Jacob Michael was shortly afterwards discovered. At that date Holford was under large liabilities to the defendant; and on being pressed for security he, on the 11th of December, in the firm belief that the possession of the vessel and the aforesaid bill of sale had been fraudulently obtained from him by Jacob Michael, executed a bill of sale of the vessel to the defendant, and the bill of sale was duly registered on the following day. Shortly afterwards Holford failed. Upon the arrival of the vessel at Queens-town the defendant endeavoured to take possession of the vessel, but was frustrated by the plaintiff, and on the arrival of the vessel at Hull he succeeded in taking possession, and discharged the plaintiff. Under these circumstances the defendant submitted that neither he nor the vessel was liable in law, either for the wages of the plaintiff or for the disbursements (if any) made by him on account of the vessel, or in respect of any bill of exchange drawn by the plaintiff on Jacob Michael, and by Jacob Michael dishonoured.

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The following statutory enactments are material to the case:—

Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), sect. 191:

“Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, which by this act or by any law or custom any seaman, not being a master, has for the recovery of his wages.”

The Admiralty Court Act, 1861 (24 Vict. c. 10), sect. 10:

“The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise; and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship.”

Sect. 35: “The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem*, or by proceedings *in personam*.”

Dr. *Tristram* in support of the motion.—The master is not

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privity to the fraud, and he was in possession as master before any right accrued to the defendant. It would be contrary to all equity that he should not receive his wages and disbursements, when he has by his services earned freight for the ship. His lien is now, by 17 & 18 Vict. c. 104, s. 191, a maritime lien, like the lien immemorially possessed by seamen; and there is no precedent to be found of a seaman's lien being ousted by circumstances like those alleged in this answer. The master's liability on the bill of exchange ought, in reason, to stand on the same footing as his actual disbursements.

Lushington contrà.—1st. As to the claim in respect of the bill of exchange, the answer is good, as liability to pay is not a "disbursement" within the meaning of the 10th section of the Admiralty Court Act: *The Chieftain* (a).

2nd. As to the wages and disbursements subsequent to the date of the defendant attempting to take possession at Queens-town, the answer is good, as from that date the master acted adversely to the asserted lawful claim of the defendant, and therefore at his own peril.

3rd. As to the wages and disbursements antecedent, it is submitted that as the master from the first held his position under a person who had no lawful right in the ship, he has no lawful lien. A person having fraudulent possession of a chattel can pass no right to a bonâ fide purchaser; Tudor's Mercantile Cases, p. 603; *Gurney v. Behrend* (b); and, pari ratione, can pass no right over the chattel to any one whom he appoints as his servant to take charge of it. It is only innkeepers and common carriers who are obliged to accept goods offered to their charge, who can maintain a lien irrespective of the title of the bailor: *Castellain v. Thompson* (c).

[Dr. *Lushington*.—According to the practice of this Court, a maritime lien rests on service done. Salvors have a lien, though mere volunteers not authorized by the owner or anybody else.]

Service may be a condition of the lien; but if rendered under an alleged authority, the validity of the authority is essential. In the case of wages the contract is essential in order to determine the amount. Voluntary salvage stands on its own peculiar principles. There is no recompense for services on land except under contract express or implied: *Lampleigh v. Braithwait* (d).

Cur. adv. vult.

(a) Ante, p. 104.

(b) 3 Ell. & Bl. 622.

(c) 13 C. B., N. S. 105.

(d) 1 Smith's Leading Cases, 135.

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DR. LUSHINGTON.—The question for the consideration of the Court is whether, assuming as true all the facts alleged in the answer, the claim of the master to his wages is barred. The argument necessarily assumed this shape, that Michael, being in fraudulent possession of the ship, could not by any contract of his bind the ship or make the real owner responsible; and it went the whole length of contending that the master appointed by a fraudulent possessor could not recover wages. It is not alleged that the master was privy to the fraud, and of course I must conclude that he was innocent of it. That a master, himself innocent of fraud, but appointed by one in fraudulent possession, can earn no wages, cannot lawfully hire seamen, nor execute a bottomry bond, nor do any other act necessary for the navigation of the vessel, is a proposition for which no authority has been cited; and independent of all authority, it appears to me an unreasonable and unjust proposition; and when the argument is pressed, as it has been, to a similar extent with regard to seamen, it almost amounts to an absurdity. It has been the immemorial custom of the Court of Admiralty to look to the service done as the ground of the claim against the ship, and by statute the master has now the same rights, liens and remedies for the recovery of his wages, which by the Merchant Shipping Act, or by any law or custom, the seaman, not being a master, has for the recovery of his wages. I think therefore that, independent of contract, the plaintiff acquired a lien upon the ship by the performance of the services.

This case is distinguishable from the case of stolen goods, in which the purchaser cannot acquire property except by purchase in market overt. It more resembles the case of the lien of an innkeeper for the keep of a horse left in his stable, though the horse may have been stolen. There is, at any rate, a wide distinction between acquiring a maritime lien and obtaining a title to the property.

This answer must therefore be amended by striking out so much of the answer as relates to the alleged fraudulent possession of Michael. As to the claim, however, in respect of the bill of exchange, I have already decided in the *Chieftain* (a) that a mere liability to pay does not constitute a “disbursement” within the meaning of the statute.

Brooks & Dubois, proctors for the plaintiff.

Marshall, solicitor for the defendant.

(a) Ante, p. 104.

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June 15.

THE ALHAMBRA.

Collision—Pleading—Amendment at Hearing.

The Court will not, at the hearing of a cause of collision, allow a plea to be added, alleging that the vessel proceeded against was in charge of a licensed pilot, and that the accident was caused by his default.

IN this case the ship Alhambra was sued by the owners of the barque Ahkera for a collision, which took place in the river Mersey whilst both vessels were at anchor.

The petition stated the fact of the collision, and alleged that "the collision was caused by the negligence of those on board the Alhambra," but did not allege any specific act of negligence.

The answer, which was in fact, *mutatis mutandis*, a copy of the petition in the cross-action, which had been previously filed, consisted of a statement of fact, and a denial that the collision was in any degree caused by those on board the Alhambra.

The action and cross-action came on for hearing together. The evidence on the part of the Alhambra had by agreement been previously taken upon affidavits. At the hearing, when the witnesses for the Ahkera were examined,

Dr. Deane, Q. C. (*Lushington* with him) applied on behalf of the Alhambra for leave to add a plea that the Alhambra was in charge of a licensed pilot, employed by compulsion of law, and that the accident was caused by his default.

Brett, Q. C. (*Cohen* with him), *contrà*.—The amendment ought not to be allowed. We might have insisted on the cross-examination of their witnesses, and altogether have adopted a different course, if this plea had been originally pleaded.

DR. LUSHINGTON.—Pleadings can only be altered upon application before the hearing, and in most cases the application should be founded on affidavit. I think that to allow this plea to be now added would place the owners of the Ahkera in an unfair position, and I therefore decline to allow the amendment.

Gregory & Co., solicitors for the Alhambra.

Pritchard & Son, proctors for the Ahkera.

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In the Privy Council.**Present—LORD KINGSDOWN.****LORD JUSTICE KNIGHT BRUCE.****The MASTER OF THE ROLLS.****THE GREAT EASTERN.*****Collision at Night between Steam-ship and Sailing Ship—Sailing Rules (1863), Articles 15, 16, 18, 19—"Moderate Speed"—"Immediate Danger."***

On a dark hazy night, in the Atlantic, a collision took place between a steamer and a sailing ship. The steamer was steering east by south half-south, and steaming thirteen knots an hour: the sailing vessel was close-hauled on the port tack, heading north-west, and was going at the rate of seven knots. The mast-head light of the steamer was observed by those on board the sailing vessel, on her port bow, distant from two to three miles, and the sailing vessel's helm was then ported. The collision occurred in about nine or ten minutes afterwards. The steamer did not observe the sailing vessel until it was impossible to avoid the collision. *Held*, that both vessels were to blame: the sailing vessel for altering her course without necessity to avoid immediate danger, and the steamer for going at an undue rate of speed.

COLLISION. This was an action brought by the owners of the late ship *Jane*, in respect of a collision which occurred between that vessel and the *Great Eastern*, on the 18th September, 1863, in the Atlantic Ocean, whereby the *Jane* was lost.

The cause was heard on the 4th February, 1864, when the learned judge of the Admiralty Court, assisted by the Trinity Masters, found that the *Great Eastern* was solely to blame for the collision. From this decision the owners of the *Great Eastern* appealed. The circumstances of the case are fully stated in their Lordships' judgment.

The sailing rules referred to were established by the 25 & 26 Vict. c. 63, and the Order in Council of the 9th January, 1863 (a), and are the following:—

Art. 15. If two ships, one of which is a sailing ship and the other a steam-ship, are proceeding in such directions as to involve risk of collision, the steam-ship shall keep out of the way of the sailing ship.

Art. 16. Every steam-ship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-ship shall, when in a fog, go at a moderate speed.

Art. 18. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.

Art. 19. In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must

(a) See Lushington's Reports, Appendix, p. lxxii.

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also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary to avoid immediate danger.

The cause was argued on the 15th July, by

Edward James, Q.C., Hannen and Pritchard, for the appellants.

Brett, Q.C., and *Lushington*, for the respondents.

Cur. adv. vult.

Judgment.

Leading facts
of the case.

On the 23rd July the MASTER OF THE ROLLS delivered the judgment of the Committee.

The collision in this case took place in the Atlantic Ocean, on the 18th September last, about 200 miles west of Cape Clear. The Jane, a vessel of 775 tons, was close-hauled on the port tack, heading north-west, and making about seven knots per hour. The Great Eastern is a steam-ship of unusual size, of 13,344 tons burden; she was heading east by south half-south, going at full speed, under both steam and sail, and making about thirteen knots per hour. The wind was west south-west. The collision took place by the starboard bow of the Great Eastern striking the port bow of the Jane. Two men on board the Jane were killed by the collision or falling of the spars; the rest of the crew escaped on board the Great Eastern. The blow was angular, that is, at the moment they were both going nearly in the same direction. The Jane was not sunk by the first collision, but she was by it and the subsequent grinding down and rolling of the Great Eastern reduced to a wreck and abandoned.

Steering Regu-
lations.

The case comes within the Regulations issued in January, 1863. By those regulations it was the duty of the Great Eastern to slacken her speed, to stop and reverse her engines, and if the weather was foggy to go at a moderate speed. It was also the duty of the Great Eastern to keep out of the way of the Jane, and by Article 18, where by the above rules one of two ships is to keep out of the way, the other shall keep her course subject to this qualification, that these rules need not be followed in any special circumstances which may render a departure from them necessary in order to avoid immediate danger. In this state of circumstances the duty of the Jane was to keep her course without alteration, unless the collision was so imminent when the Great Eastern was first discovered as to render a departure from the above rules necessary for the purpose of avoiding danger.

Both vessels were carrying their proper lights. This is disputed on behalf of the Great Eastern; but the evidence is distinct on behalf of the Jane that the lights were properly fixed

and duly trimmed, and if they were not seen on board the Great Eastern it appears to their Lordships that this could only have arisen from the circumstance either that the look-out was not sufficient, or that the state of the weather prevented their being observed.

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Their Lordships first proceed to consider the evidence relative to the *Jane*, for the purpose of ascertaining whether she adopted the course which, having regard to the position of the vessels and the new rules, it was her duty to take.

The conduct of
the *Jane*.

It is established by the evidence that the white light of the Great Eastern at the foremast head was the light first seen. [The judgment then examined the evidence of the witnesses from the *Jane*, the result of which was that the estimate of the distance of the white light of the Great Eastern when first seen was from two to three miles.] Their Lordships consider that the distance at which the mast-head light of a steamer is off when first observed, unless quite close, must be mere conjecture. Except the brightness of the light, the only indication is the angle above the horizon at which the light is seen, and a more distant light might present the same angle as a nearer light if the elevation of the distant light were greater; and if the more distant light were in fact brighter than the nearer one it might present the same appearance of distance. The only other criterion of distance is the time which elapsed before the collision took place; this is also necessarily vague from the imperfection of the recollection of men under such circumstances, when anxiety of mind and the rapidity of events crowded into a short space of time have a natural tendency on recollection to make the time seem longer than it really was. On this point, however, there is much agreement in the evidence of the witnesses on board the *Jane*. [The judgment then showed that the interval of time between seeing the white and seeing the green light was stated by two witnesses only, named Mathie and Law, and that they put it at from nine to ten minutes.] As, however, the vessels were approaching each other at the rate of a mile in every three minutes, the nine or ten minutes spoken of by the two witnesses Law and Mathie would agree with the evidence which puts the vessels at from two or three miles off when the Great Eastern was first seen on board the *Jane*.

The conclusion
from the evi-
dence is that
the *Jane* saw
the Great
Eastern's light
from two to
three miles
distant, and
about nine or
ten minutes
before the col-
lision,

To arrive at a satisfactory conclusion as to the answer to be given to the next question is very important. Did the *Jane* on first observing the Great Eastern port her helm, or did she not do so till after the green light of the Great Eastern was observed, when it is admitted on both sides that it was proper to do so in order to save the lives of all on board?

and then
ported.

If the *Jane* on the first observation of the mast-head light of

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the Great Eastern was ten minutes off, and from two to three miles distant, and if she then ported her helm, she was in the wrong, and acted contrary to the 18th Article of the Regulations, which has been already mentioned. [The judgment then examined the evidence as to the time of porting, and continued :] In the preliminary act, filed in pursuance of the orders of November, 1859, the 12th Article of the statement on behalf of the owners of the Jane is in these words : — “ Upon the bright light being observed, and before the green light was seen, the helm of the Jane was put hard-a-port.” This statement was made 24th of October, 1863, within six weeks after the collision had taken place, and while the facts were fresh in the memory of the witnesses. It agrees with the evidence of Verso, and also with the evidence of Phillips, when so examined as to make it consistent with itself. The conclusion to which their Lordships have come is, that the evidence given on behalf of the Jane is not inconsistent with the statement made on her behalf in the preliminary act, and that the case is taken out of the rules laid down in the report of the *Inflexible* (a) and *Vortigern* (b) referred to in the argument.

The Jane was, therefore, to blame for altering her course without necessity.

If the view which their Lordships have taken of the evidence on behalf of the Jane be correct, it establishes the fact that the course of the Jane was in violation of the 18th Article of the Regulations, and this violation, in the opinion of the nautical gentlemen by whom they are assisted, has materially contributed to the collision which took place. These gentlemen are of opinion that if the Jane had been kept on her course hauling her a little closer to the wind and thereby diminishing her speed, instead of falling off and thereby increasing her speed and accelerating the rate of approximation to the Great Eastern, the collision would have been avoided. Their Lordships therefore have come to the conclusion that the Jane was to blame in this case.

The Great Eastern was also to blame for proceeding at what, under the circumstances, was an undue rate of speed.

Their Lordships, however, concur with the Court below in considering that the Great Eastern was to blame also. Without expressing any opinion on the point whether the look-out on the Great Eastern was or was not sufficient, their Lordships consider it to be proved that the lights of the Jane were properly fixed and brightly burning. In truth this seems scarcely to have been capable of being contested on the evidence adduced. If the Great Eastern had a proper and sufficient look-out, the port light ought to have been seen, unless the state of the weather rendered it impossible to do so. The evidence on both sides evinces that the way of the steamer was much diminished at the time of the collision, and that she was then going very slowly through the water. Their Lordships, however, are of opinion that the collision was in a great measure attributable

(a) Swabey, 32.

(b) Swabey, 518.

to the state of the weather and the rate at which the Great Eastern was proceeding, which was not, in the opinion of their Lordships, justifiable in the circumstances. The rate at which she was proceeding is stated in the preliminary act as twelve knots per hour; the evidence states that by the log it was fifteen knots, and after allowing two knots for the current produced by the paddle-wheels, the rate cannot properly be put at less than thirteen knots an hour, when the paddle-engines and the screw-engines were working full power, and every sail was set that could be set to accelerate her pace. At the same time the state of the weather was this: in the preliminary act on behalf of the Jane, it is stated to have been thick with showers of rain, and, on behalf of the Great Eastern, dark and raining. The witnesses on both sides state that it was a dark night, hazy weather, and that a drizzling rain was falling.

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Their Lordships do not mean to lay down any rule beyond that expressed in the regulations themselves as to the occasion when a steam-vessel is bound to moderate her speed, or as to the rate which in the circumstances described in the evidence she ought not to exceed; but their Lordships are of opinion that it is the duty of the steamer to proceed only at such a rate of speed as will enable her, after discovering a vessel meeting her, to stop and reverse her engines in sufficient time to prevent any collision from taking place. Here the evidence shows that from the moment the Jane was reported on board the Great Eastern everything was done to avert the collision, but without success. If the Jane had been wholly in the right, and by pursuing her course properly had been in the spot where the collision took place, the rate of speed at which the Great Eastern was advancing would have rendered their contact inevitable. Their Lordships are of opinion that it was the duty of the Great Eastern to proceed at no greater speed than, having regard to the state of the weather, made it possible to avert the collision. Their Lordships therefore are of opinion that both vessels were to blame, and that the collision is attributable to both. That the Jane, by not holding on her course when she first saw the masthead light of the Great Eastern, got into a position which brought her directly against the Great Eastern, and that the rate of speed at which the Great Eastern was advancing made it impossible for her, when she first observed the Jane, to avoid the catastrophe which occurred.

Their Lordships will humbly advise her Majesty that the judgment of the Court below be altered accordingly.

Pritchard & Sons, proctors for the appellants.

Tebbs & Sons, proctors for the respondents.

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THE BAHIA.

Bill of Lading—Duty to carry on, trans-ship or deliver—Reasonable Time allowed to the Master—Conflict of Laws—Law of France as to Abandonment of Ship to the Insurers.

If a bill of lading is given by the master of a foreign vessel, the agreements to be implied as to the duty of the master to carry on, trans-ship or deliver the goods at an intermediate port of refuge, will be ascertained by reference to the law of the flag which the vessel carried, and not by reference to the *lex loci contractus*, or the *lex fori* or the law of the place where the breach of contract by the master is alleged to have been committed.

If a vessel during her voyage suffers sea damage, and is compelled to put into a port of refuge, then by the law of England the master is not bound to trans-ship. He is allowed a reasonable time either to repair and carry on or to trans-ship. If he absolutely declines to do either, he may be called upon to deliver without payment of any freight; but before a reasonable time has elapsed, he cannot be required to deliver, except on payment of full freight or waiver thereof.

In estimating what is reasonable time, the Court will take all circumstances into consideration, including any delay caused by the *vis major* of competent authority, whether administrative or judicial.

A bill of lading in English was given by the master of the French vessel Bahia, lying in New York, by which the goods were made deliverable at Dunkirk in France. The vessel during her voyage suffered sea damage, and put into the port of Ramsgate in England (7 Jan., 1863). The cargo was there unladen, and the ship surveyed. The surveyors reported that the cost of repairs would exceed the value of the ship repaired. The master executed a deed of abandonment of the ship to the underwriters in France with whom she was insured. Before the French vice-consul granted (as in ordinary course) the certificate of innavigability required by French law as sanctioning the abandonment, the French underwriters instituted proceedings in the tribunal of commerce of Marseilles, and obtained an order for the ship to be taken to Dunkirk to be repaired, and the vice-consul was then ordered by the consul-general to withhold the certificate of innavigability. The owner of the ship appealed from the decree of the tribunal of commerce to a higher Court. The owners of the cargo offered the master full freight, less expenses of carrying on the cargo to Dunkirk, and demanded delivery at Ramsgate. This was refused, and they then (13th March, 1863) arrested the ship. Subsequently the cargo was obtained from the master's possession without his consent, and carried to Dunkirk. Proceedings were then taken in France by the owner of the Bahia against the cargo to recover the original freight, and the Court there pronounced that the owners of the cargo "having withdrawn their goods in consequence of being unwilling to wait the solution of the question whether the vessel could or could not be put into a proper condition, owed the whole freight." *Held*, that in these circumstances the reasonable time allowed to the master had not elapsed at the time of action brought; that he had committed no breach of contract, and the suit was dismissed with costs.

THIS suit was instituted under the 6th section of the Admiralty Court Act, 1861, which provides "that the High Court of Admiralty shall have jurisdiction over any claim by the owner, or consignee, or assignee of any bill of lading of any

goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship, unless it is shown that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

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The vessel proceeded against was the Bahia, a French barque belonging to the port of Marseilles. The plaintiffs were Messrs. Dumas, Hankey & Co., merchants residing in London, owners of a cargo of corn shipped on board the Bahia.

The following statement of facts is taken from the judgment :

On the 17th of September, 1862, the Bahia, a French vessel, which was then lying at the Danish Island of St. Thomas, was chartered to Mr. A. H. Soloman, of New York. The voyage was to be from the port of New York to Queenstown for orders to discharge at a port in the United Kingdom, Havre or Marseilles, a provision which was afterwards extended to Dunkirk. The charterer undertook to load a complete cargo and to pay freight at so much a quarter, and to advance money for ship's necessary disbursements in New York, subject to insurance. The master engaged to receive on board all such goods as the charterer or his agent might think proper to ship, and to sign bills of lading without prejudice to the charter-party.

Early in November, 1862, the vessel being then at New York, Messrs. Sautier & Wierum, merchants of New York, shipped on board the Bahia 17,080 bushels of corn, which was the entire cargo of the ship; and on the 5th of November the master signed bills of lading. These bills of lading were, like the charter-party, in English; they made the corn deliverable in good order at the port of Dunkirk in France, unto order or assigns, he or they paying freight for the said corn as per charter-party.

These bills of lading were afterwards assigned to the present plaintiffs, Dumas, Hankey & Co., merchants of the city of London, and they by this assignment became the owners of the corn.

On the 12th of November, Soloman transferred his interest in the charter to Sautier & Wierum by the following indorsement on the charter.

" New York, 12 Nov. 1862.

" I hereby transfer my interest in the said charter to Messrs. H. Sautier & Wierum.

" A. H. SOLOMAN.

" H. SAUTIER & WIERUM."

And on the 18th of November there was another indorsement,

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to the effect that the master had received from Sautier & Wierum at New York, in advance of freight, the sum of 469*l.* 3*s.* 4*d.*, subject to insurance by the freighters.

The ship then sailed on her voyage, but met with severe weather, and sustained great damage, both particular average and general; and on the 7th of January, 1863, she put into the port of Ramsgate in distress.

The master of the ship, a person of the name of Dugas, who had succeeded to Captain Blanc, reported himself to the French vice-consul at Ramsgate, Mr. Charles Weber, who was also a member of the firm of Hammond & Co., who acted as the agents for the ship. By direction of the vice-consul various surveys were held on the ship and cargo; and in pursuance of the surveys the whole of the cargo was discharged and warehoused in Ramsgate; part in the Pier Stores belonging to the Board of Trade, and hired for the purpose by Hammond & Co., and part in stores belonging to Hammond & Co. themselves. The corn was found to be heated; it was therefore duly separated and stored, and the proper measures were taken for its preservation by Hammond & Co., under the direction or approbation of an agent appointed by Dumas, Hankey & Co., the owners of the corn.

On the 2nd of February, 1863, the surveyors appointed by the vice-consul reported that the expense of the necessary repairs of the ship would amount to the sum of 2,913*l.* 18*s.* It was conceded at the trial that this estimate was correct, and that the sum named would exceed the value of the ship if repaired.

Upon this survey the master, apparently about the same date (2nd February), executed before the vice-consul a deed of abandonment of the ship to the underwriters; and notice of abandonment was given by M. Bonnefoi, the owner of the ship, to certain insurance companies with whom the ship had been insured in the sum of 3,200*l.*, which sum was also stated in the policy to be her value by common appraisement.

The insurance companies refused to accept the abandonment, and applied to the consul-general of France in London to allow them to remove the ship from Ramsgate to Dunkirk, there to be surveyed and repaired, if the expense there would allow. The exact date of this application was not proved, but it appeared from Mr. Weber's evidence that the vice-consul declined to give the captain the certificate of innavigability, stating that he was prevented by the orders of the consul-general.

By French law, it was proved, a master is not at liberty to abandon upon his own view that the ship is innavigable; the abandonment is not complete until the deed of abandonment has been legalized by a certificate of innavigability from appointed

authorities: in a case like the present the authority would be the French vice-consul. Usually such a certificate follows immediately, as a matter of course. It was therefore probably shortly after the 2nd of February that the consul-general gave the insurance companies the authority they demanded to remove the vessel from Ramsgate to Dunkirk for repairs; but before it was acted upon, they obtained an order to the like effect from the Tribunal of Commerce at Marseilles. The judgment of this tribunal was dated the 4th of March. The proceedings at Marseilles to procure that order were between the insurance companies on the one hand, and Bonnefoi, the owner of the ship, on the other: Dumas, Hankey & Co., the owners of the corn, were not parties to the suit at all; but the judgment expressly stated that "the owners of the corn, not having been represented in the cause, there was reserved to them the right to appeal, on such points as they might think proper, against the decision given between the owner and his underwriters." Of this judgment the plaintiffs had notice, if not formally, at least from the defendant, who, in his letter to them of the 4th of March, added a copy of the judgment. Bonnefoi appealed from the decree to the Imperial Court of Aix, but the decree was "*exécutoire sans appel*," that is, its execution might be enforced at once, and was not stayed pending the appeal. The decree was, in fact, affirmed by the Court of Aix on the 25th of March, 1863, and by the Court of Cassation on the 22nd of March, 1864. Both judgments were put in evidence.

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While this litigation was being instituted in France the cargo remained warehoused at Ramsgate, and some correspondence had taken place between Dumas, Hankey & Co., who were anxious to get their cargo, and M. Bonnefoi.

The following passage from a letter of Dumas, Hankey & Co. to M. Bonnefoi, dated 23rd Jan., 1863, shows the terms then offered by the plaintiffs, and demanded by the master, as the condition on which the cargo might be handed over to the plaintiffs at Ramsgate:—

"The master claims payment of his freight to Ramsgate, in proportion to the distance traversed by the ship from New York, taking for the basis of his calculation the amount of freight from New York to Dunkirk. In accordance with the custom, we are willing to pay him the whole of the freight from New York to Dunkirk, as regulated by the considerations mentioned in the charter-party, less the cost of transport from Ramsgate to Dunkirk."

Shortly afterwards, however, M. Bonnefoi himself wrote a letter to the plaintiffs, demanding that they should pay into the

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hands of the master the entire charter freight, without deduction of any kind, even of the advances in New York. It was admitted by the counsel for the defendant, that if the master was bound to give up the cargo on payment of the full freight, these advances must be deducted.

Subsequently also, on the 11th March, Mr. Stibbard, solicitor to the plaintiffs, went down to Ramsgate, saw the master, and then offered, if the master would give him the cargo, to deposit in a bank the whole sum claimed, and to sign the usual general average bond. The master replied that he would not give up the cargo, unless the full charter freight was paid to him without deduction. This was in accordance with M. Bonnefoi's letter to the plaintiffs of the 7th March, and also, it appears, with directions given by M. Bonnefoi to Hammond & Co.

On the 13th of March, 1863, Dumas, Hankey & Co. instituted this cause under the provisions of the 6th section of the Admiralty Court Act, and, on the 14th of March, arrested the ship. The ship was not bailed, and continued under arrest of the Court.

The plaintiffs subsequently obtained possession of the corn, and conveyed it to Dunkirk. The portion warehoused in the Pier Stores they obtained on the 23rd of March, and the other part on the 27th April. It is not material to state by what means they so obtained possession, as it was not disputed that it was against the consent of the owner and master of the ship.

The corn was, upon its arrival at Dunkirk, arrested by M. Bonnefoi for the freight due to him under the Bahia's charter. Dumas, Hankey & Co. intervened as owners of the corn, and, after discussion, the Tribunal of Commerce at Dunkirk on the 29th of July, 1863, pronounced judgment, declaring that the present plaintiffs, "Dumas, Hankey & Co. having withdrawn their goods, in consequence of being unwilling to await the solution of the question whether the vessel could or could not be put into a proper condition, owed the entire freight, less only the advances at New York."

The substance of the complaint in the petition in the Admiralty Court was that the master had refused either to re-ship or to trans-ship or to deliver; in short, to do anything, and that the plaintiffs had thereby suffered damages. The defendants pleaded and put in evidence the above facts.

The following is an extract from the opinion of two French advocates (MM. Aicard and Thourel), which was put in evidence by the defendants:—

"Upon a French vessel arriving in distress in a foreign port, where there is a vice-consul of France, it is the duty of the

master to make a formal report to such vice-consul (Code de Commerce, Arts. 244, 245); and the vice-consul thereupon orders a survey of the vessel, and an estimate of the expense necessary to repair the ship, so as to enable her to pursue her voyage. If such estimate shows that such expenses would exceed three-fourths of the value of the ship, the vice-consul pronounces the vessel innavigable, and orders the vessel to be sold. If, however, there is in the country a consul-general of France, the vice-consul, before doing so, usually obtains authority from such consul-general; but such authority is, save in circumstances altogether exceptional, accorded as a matter of course.

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“In the present case therefore we are of opinion that upon the survey, dated 2nd Feb., 1863, and the act of abandonment executed by the master, the vice-consul of France at Ramsgate would, in ordinary course, have declared the vessel innavigable, and have proceeded to order a sale of the vessel at Ramsgate. Without innavigability thus legally pronounced, the master would have no legal authority to sell the vessel, the 237th art. of the Code de Commerce prescribing

“ ‘Hors le cas d’innavigabilité légalement constatée, le capitaine ne peut, à peine de nullité de la vente, vendre le navire sans un pouvoir spécial des propriétaires.’

“The master of the vessel was not bound to have repaired the ship at Ramsgate, inasmuch as, according to the estimate of the surveyors appointed by the consul’s authority, the necessary expenses of the repairs would have amounted to more than the value of the vessel. If the vice-consul had pronounced for the innavigability of the ship, the master would have been bound to trans-ship the wheat, or to have delivered it to the holders of the bills of lading, upon payment by them of a pro rata freight; but inasmuch as the vice-consul was restrained from such a course, as we have before said, the master of the ship would not have been justified either in trans-shipping the wheat, or in delivering it at Ramsgate. The owners of the cargo, moreover, though strangers to the cause of the delay, were bound to wait for the decision of the vice-consul ordering the ship to be repaired, or the cargo to be trans-shipped, or delivered at Ramsgate.”

The following are the articles of the French Code de Commerce referred to :—

“245. Si, pendant le cours du voyage, le capitaine est obligé de relâcher dans un port Français, il est tenu de déclarer au président du Tribunal de Commerce du lieu les causes de sa relâche. Dans les lieux où il n’y a pas de Tribunal de Commerce, la déclaration est faite au juge de paix du canton. Si la relâche

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forcée a lieu dans un port étranger, la déclaration est faite au consul de France, ou, à son défaut, au magistrat du lieu.

293. Le chargeur qui retire ses marchandises pendant le voyage, est tenu de payer le fret en entier et tous les frais de déplacement occasionnés par le déchargement: si les marchandises sont retirées pour cause des faits ou des fautes du capitaine, celui-ci est responsable de tous les frais.

296. Si le capitaine est contraint de faire radoubler le navire pendant le voyage, l'affrèteur est tenu d'attendre, ou de payer le fret en entier. Dans le cas où le navire ne pourrait être radoubé, le capitaine est tenu d'en louer un autre. Si le capitaine n'a pu louer un autre navire, le fret n'est dû qu'à proportion de ce que le voyage est avancé.

390. Si le navire a été déclaré innavigable, l'assuré sur le chargement est tenu d'en faire la notification dans le délai de trois jours de la reception de la nouvelle.

391. Le capitaine est tenu, dans ce cas, de faire toutes diligences pour se procurer un autre navire à l'effet de transporter les marchandises au lieu de leur destination."

Sir *George Honyman* and *Clarkson* for plaintiffs.—The law of New York should govern, for the bill of lading was there made, and was in the language of New York. In the absence of proof to the contrary the law of New York must be presumed to be the same as the law of England: *Prince George* (a); *Brown v. Gracey* (b). If necessary we contend that the law of England applies, because the ship was in English waters and the alleged breach of contract was here committed.

By the law of England we submit the plaintiffs are entitled to damages. The master had abandoned all intention to carry on in the Bahia or to trans-ship; and he refused to deliver at Ramsgate, even though he was offered a pro ratâ freight.

We deny that the law of France was applicable. The Privy Council in the *Hamburg* (c) decided that the law of the flag was not to govern such transactions. *Lloyd v. Guibert* (d) applies only to the authority of the master to make a contract.

But if French law does apply, it furnishes no protection to the defendant; for he refused to trans-ship, which was his duty. The 293rd Article of the French Code, which says that the merchant withdrawing his goods during the voyage is bound to pay full freight, does not apply, for that assumes that the master

(a) 4 Moore, P. C. 21.

(c) Ante, p. 253.

(b) D. & R., Cases at Nisi Prius, note p. 41.

(d) 6 B. & S. 100; S. C., Law Rep. 1 Q. B. 115.

is willing to carry on. The Marseilles and Aix judgments, and that of the Court of Cassation, do not bind the plaintiffs, being *res inter alios acta*; and the Dunkirk judgment leaves free the action for not carrying on, even if it decides that the plaintiffs, on taking away their goods, made themselves liable to pay full freight. On the whole it would be manifestly inequitable that the owners of cargo should be kept waiting an indefinite time, whilst the shipowner was litigating with his underwriters.

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Brett, Q. C., and Lushington, contra.—There has been no breach of contract or duty in this case. The master had not abandoned the voyage: he had not even completed the abandonment of the ship: it was still open to him to have repaired the ship or to have trans-shipped the cargo, when the plaintiffs commenced proceedings and arrested the ship. We contend that the French law applies, as being the law of the ship's flag; *Lloyd v. Guibert* (a); and that by that law the plaintiffs were bound to await the decision of the master. The English law also provides that the master has a reasonable time to make his election, and that in calculating this reasonable time, enforced delay by third parties strangers to the contract is to be considered: *Cargo ex Galam* (b).

The plaintiffs were never entitled to delivery at Ramsgate, for they never tendered the full freight due: *Tindall v. Taylor* (c).

Cur. adv. vult.

DR. LUSHINGTON.—Great part of the argument was upon the question, as to which country furnished the law for regulating the obligation of the master to the plaintiffs under the actual circumstances. This point I will proceed to consider, though I am doubtful whether this will prove to be necessary for the decision of the case.

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First, then, this cannot properly be called a question of construction, for there is little or no dispute as to the meaning of the terms of the bill of lading. The question rather may thus be stated generally: given an agreement between two parties, what is the law that was actually contemplated or must be taken to have been contemplated by them as the law for determining what mutual obligations not expressed should be implied? Judged by this test alone the British law would not, I think, be applicable; for neither of the parties to this contract, which was evidenced by the bill of lading, contemplated

British law is not applicable to the case; for neither of the parties to the contract contemplated it; and the question is one of contract, not of local law or procedure.

(a) 6 B. & S. 100; S. C. Law Rep. 1 Q. B. 115.

(b) Ante, p. 167.

(c) 4 Ell. & Bl. 219.

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the application of British law. Neither of the parties was a British subject, nor was the port where the contract was made a British port, nor was it intended that the vessel should go to a British port. If then British law be applicable it must be that it was brought in by after-circumstances, irrespective of the original contract. As to this, it was said that though the shippers were American, the indorsees of the bill of lading were British subjects. But this was a mere accident and may be disregarded. Then it was said that the place where the alleged wrong was committed by the master was a British port, and that the *lex fori*, which has to adjudicate upon this alleged wrong, is British law. Now there is no doubt that in the case of a foreign ship coming from distress of weather within local British jurisdiction, both ship and cargo are in many respects subject to British law. They would be so, *e. g.*, in respect of pilot dues, port dues, quarantine regulations and other matters of that description, and also as to any particular enactments which, by the law of the land, are expressly applicable to ships in general; but it does not, therefore, follow that the terms of a contract of affreightment of the cargo should be governed by English law. For were this the rule, then if a British ship were found in a French port, her owners would have to submit to French law, and all charter-parties and bills of lading would be governed accordingly. Save therefore so far as the *lex loci* is applicable *ratione loci* or *ratione fori*, I cannot hold that British law is applicable to this case; and I think that a British Court, having to adjudicate with respect to the contract, should adopt the foreign law which had from the beginning been contemplated as binding between the contracting parties.

The law of the vessel's flag ought to prevail.

In the present case, this must be either the French law or the New York law, for it was not contended that the law of St. Thomas, where the charter was made, governed the contract between the master and the shipper. Which then of these two laws ought to prevail? The facts, on which reliance is placed in order to prove the New York law to be applicable, are, that the bill of lading was made at New York, and in English, that is, the language of New York, and in terms not unusual in American contracts of affreightment. On the other hand, the circumstances in favour of the applicability of the French law are, that the vessel was a French vessel owned by a resident in France, and that the contract was to be finally executed in France, for the port of destination was Dunkirk. Now, if the Court were to pronounce in favour of the law of New York as the *lex loci contractûs*, the practical effect would be that a master of a ship touching at ports of different countries, and taking goods

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from thence, would on his arrival at any intermediate port, or at the port of destination, find himself and his ship subject at the same time to the different laws of several foreign countries—a result nothing short of confusion. Again, it is to be remembered that the master was but an agent, acting for an absent principal, that principal being a domiciled native of France. If therefore the law of the flag of the vessel be adopted, but not otherwise, the shipowner would be able to measure beforehand the character of his duties and liabilities as a carrier, and all the contracts of the same nature entered into by his agent abroad would be regulated by a uniform principle. Nor could the shipper have any reason to complain; for the flag of the vessel would be sufficient notice to him of the law by which his contract of affreightment, if he chose to enter into one, would be governed. The case of *Lloyd v. Guibert* (a) is a direct authority for this position. Accordingly in the present case, the *Bahia* being a French vessel, I incline to consider that, so far from inserting by implication into this bill of lading any agreement to accept the law of New York as to the neutral rights of masters and consignees of cargo as to trans-shipment, &c., the master had no authority to bind the ship-owner to accept the law of New York, and that the shipper must be taken to have known beforehand that, if circumstances like the present should arise, the dispute would have to be settled by French law.

I should add that if I were to decide this case by the law of the State of New York, I could not hastily come to the conclusion that it was the same as that of England, without some direct proof. However, although my opinion is strongly in favour of the applicability of the French law exclusively, I think it will be more satisfactory if I consider, not only what would be the results according to French law, but what would be the results according to New York law, supposing that to be the same as British law.

The laws of both countries (France and England) as to contracts of affreightment, however they may differ in particulars, have one object: to do justice to both parties, the master and the owner of the goods; to secure to each the full benefit of the contract, so far as it is not unfair to the other. Suppose, then, a ship, through injuries occasioned by perils of the seas, is forced during her voyage to put into an intermediate port, it would be unjust to the owner of the goods that his goods should be detained there an indefinite time; but, on the other hand, it would be unjust to the master that he should forthwith be prevented from earning his freight.

(a) 6 B. & S. p. 100; S. C. Law Rep. 1 Q. B. 115.

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French law as to the duty of the master towards the cargo on putting into a port of distress.

The question is, within what limits of time, or other conditions, the laws of the two countries allow to the master the option of repairing and carrying on, or trans-shipping or delivering?

First, then, as to French law. The materials on which the Court has to found its judgment are, (1) the articles in the Code de Commerce; (2) the opinions of the French lawyers which have been produced in evidence; and (3) the decrees of the French Courts in this particular case.

As to this last, it is perfectly true that the judgments of the Tribunal of Commerce at Marseilles, the Imperial Court of Aix, and the Court of Cassation (all given in the action between the underwriters and the shipowners) may not be binding upon the plaintiffs, who are the owners of the cargo, and were not parties. But it is not to be forgotten that the plaintiffs would have been allowed to intervene, and had notice of this liberty in M. Bonnefoi's letter to them of the 4th of March. So, too, it is true that the judgment of the Tribunal of Commerce at Dunkirk, though given between the parties, is not absolutely conclusive in the present case; for it is conceivable that in an action for freight the shipowner may be entitled to full freight, and yet that a cross-action may lie against him by the owner of the goods for damages. I apprehend, however, that the declarations of the French tribunals in each of these several judgments are admissible as evidence to show what the French law is.

By the French law, in the event of the ship being forced to put into an intermediate port from injuries received, there is, in the first place, no absolute obligation to re-ship and carry on. That, indeed, is often impossible; the ship may have been lost, or have received irreparable injuries. 2ndly. There is no absolute obligation to trans-ship; the obligation arises only in the event of the ship having been declared innavigable by competent authority. Code art. 296, 390, 391. 3rdly. There is no unconditional obligation to deliver. The master may, if he think proper, insist on delivering, and then he is entitled to freight *pro ratâ itineris*. Code art. 296. In the present case the master did offer to deliver, but only upon terms of his receiving full freight, without even any deduction for freight already paid in advance. This clearly was a demand for more than the master was entitled to, as was admitted at the bar. On the other hand, the French law allows the owner of the goods, if he think proper, to demand delivery, but in that case requires him to pay the full freight due. Code art. 293, 296. This entire freight the plaintiffs never offered to pay. They only offered to deposit it with a bank. No French authority was produced to show that an offer to deposit is equivalent to a tender of payment, so as to entitle

the owner of the cargo to delivery. The plaintiffs, however, did also make an offer of payment ; but that so far from being an offer to pay the whole freight, less the advances, was not even an offer to pay the freight *pro ratâ itineris*. It was an offer to pay the whole freight, less the expenses of carrying on the cargo from Ramsgate to Dunkirk. A *pro ratâ* freight is quite a different thing, being calculated upon the distance actually accomplished of the whole voyage, and independent of the consideration of the expense required to complete the remainder. The plaintiffs therefore were by French law never entitled to delivery. It is true that the master made an exorbitant demand ; but of this the plaintiffs cannot complain, if they were never willing to pay what was legally due from them. The plaintiffs had in their possession all the knowledge necessary to enable them to ascertain what was the amount of the freight due.

The negotiations for delivery having thus failed, the master had still the option either to repair and carry on, or to trans-ship. The plaintiffs contended that the master did decline either to carry on or to trans-ship. But I think this is not proved by the evidence. It is true that the defendant never offered to trans-ship ; but the question of trans-shipment never arose : it could not, in fact, arise whilst the question of abandonment was still in abeyance ; and beyond all doubt it was in abeyance. The master, indeed, was desirous to abandon, and had executed a deed of abandonment ; but this was ineffectual until he had obtained a certificate of innavigability from the authorities. For this certificate he applied, but was prevented from obtaining it by the action of the underwriters in the French Courts ; indeed, so far was the master from having finally abandoned his vessel, that if the Dunkirk surveyors had reported unfavourably to the right of abandonment, it is fair to conclude he would have had the vessel repaired. The fact was the question of abandonment was a question, to use the French phrase, “awaiting solution,” and, till it was settled, the master could neither abandon nor trans-ship.

Then I think it clear that the French law will allow the master reasonable time to determine whether he will carry on, and, in the event of his determining not to carry on, a further reasonable time, whether he will trans-ship or deliver. The only question is whether the delay required to settle the litigation in France between the shipowner and the underwriters can be considered a reasonable delay as between the master and the owners of cargo. A consideration of the 296th art. of the Code, of the opinions of the French lawyers given in evidence, and of the

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freight.

As the plaintiffs never tendered full freight, they never entitled themselves to delivery at Ramsgate.

Whilst the question of abandonment was in abeyance, the master could neither repair nor trans-ship.

and by the French law, the plaintiffs were bound to wait the settlement of this question.

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judgment of the Tribunal of Commerce at Dunkirk, leads me to the conclusion that, according to French law, the plaintiffs, as owners of cargo, were bound to await the solution of the questions pending between the shipowner and his underwriters. This may seem hard upon the plaintiffs, seeing that the litigation did not finally close until the judgment of the Court of Cassation on the 22nd of March, 1864, after the lapse, that is, of more than a year from the date of the vessel putting into Ramsgate, and that this final judgment, like its precursors in the inferior tribunals, was against the shipowner, and is conclusive that the shipowner was, by French law, not justified against the underwriters in resisting their application. But, as against this must be set several considerations: first, the plaintiffs are estopped from denying the right of the defendant to resist (at all events, in the first instance) the application of the underwriters, inasmuch as the plaintiffs have admitted the accuracy of the Ramsgate surveyors, showing that the repairs of the vessel would exceed her value. Second, that though the final sentence by the Court of Cassation was not delivered for fourteen months, the date of the first sentence in the Marseilles Court was on the 4th of March, 1863, a little more than a month after the date of the Ramsgate survey, and that the sentence, being "*exécutoire sans appel*," might have been enforced immediately, and that by the plaintiffs themselves, to whom liberty to intervene was expressly reserved. Third, that on the 14th of March, 1863, the plaintiffs arrested the vessel, and took possession of the cargo, partly on the 23rd of March, partly in the following month of April. These acts of the plaintiffs reduce the total delay to a period of a few weeks only, and during this period, assuming that the surveyors were right, as admitted by the plaintiffs, the defendant was not idle: he sought to abandon the vessel, he exerted himself to procure the certificate of innavigability, and, with this view, resisted the application of the underwriters to have the vessel removed to Dunkirk.

Under these circumstances, I must hold that, if the case be judged by French law, the plaintiffs are not entitled to recover from the defendant. But in holding this, I do not decide that a master of a vessel would not be answerable to owners of goods for a long and unreasonable delay, caused by litigation improperly carried on by himself with his underwriters. But that is not the present case.

Now as to the law of the State of New York. Assuming it to be the same as the English law, it will be found in many important respects to coincide with the French law. The chief

authorities on the subject are collected in Mr. Brett's argument in the case of *Blasco v. Fletcher* (a), to which the Court is much indebted. The result may be stated as follows:—First. There is and can be no absolute obligation on the part of the master towards the owner of goods to forward them in the original vessel; although, of course, it is the duty of the master, in his capacity of agent to the shipowner, to do so if he can: *Benson v. Chapman* (b). Second. It has never yet been decided that the master in any case is bound to trans-ship; all that has been decided is, that he is at liberty to trans-ship: *The Hamburg* (c), and cases there cited. Third. There is no absolute obligation to deliver at the intermediate port, unless full freight be paid; and, in the present case, as I have previously stated, full freight was never offered by the plaintiffs: *Tyndall v. Taylor* (d). The only exception to this rule is, where the master declines either to carry on or to trans-ship—in short, abandons his contract altogether; in that case, the consignee is entitled to his goods without payment of any freight at all: *Hunter v. Prinsep* (e). In the present instance I have already held that the defendant did not decline either to carry on or to trans-ship. Indeed, supposing the defendant to have declined to carry on, the Court could not, without positive evidence of the fact (which is here wanting) conclude that the defendant had declined to trans-ship, because, looking to his own interest, he would have preferred to trans-ship from Ramsgate to Dunkirk, rather than pay the penalty under British law of forfeiting the whole of his freight. Fourth. British law, like the French law, allows to the master a reasonable time within which he may exercise his option: *Cargo ex Galam* (f). And by “reasonable,” I think, must be meant that which is reasonable, all circumstances being considered, and amongst these circumstances would be the *vis major* of the decree of a judicial tribunal: *Hadley v. Clarke* (g). Nor does it make any difference that the tribunal was a French one. Because it is for the British law to determine the rights of the owner of the goods against the master (as, for the purpose of the argument, I am now assuming), that is no reason that the British law should overlook the fact that the relations of the shipowner, the master and the underwriters were all governed by French law; and the consequences of that fact, viz., that the master could not abandon or sell the vessel without having obtained a formal certificate of innavigability, and that if the

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The English law, as to the rights and duties of the master putting into a port of distress.

The defendant did not abandon the voyage; and considering the French law which pressed upon the master, this reasonable time allowed him for his decision had not expired.

(a) 14 C. B., N. S. 147.

(b) 2 H. of L. Ca. 720.

(c) Ante, p. 258.

(d) 4 El. & Bl. 227.

(e) 10 East, 394.

(f) Ante, p. 167.

(g) 8 Term Rep. 259.

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for the de-
fendants, with
costs.

shipowner intended to insist on abandonment, it was necessary for him to oppose the application of the underwriters. In short, in estimating what is a reasonable delay, the British law would practically take into consideration the same circumstances as the French law would. And I have already held that by the French law, as it appears to me, the plaintiffs are not in a position to complain of the delay, so far as it was occasioned by French litigation.

The claim of the plaintiffs, then, fails equally whether tried by French law or by New York law, and I must pronounce against it, with costs.

Clarkson & Son, for the plaintiffs.

Rothery & Co., for the defendants.

THE PENSACOLA.

Salvage of Life—Agreement between Tug Companies and Dock Board—17 & 18 Vict. c. 104, ss. 458, 459.

The Mersey Docks and Harbour Board, acting in pursuance of enabling powers given them by their Dock Act (21 & 22 Vict. c. xcii. s. 109), entered into an agreement with certain steam-tug companies at Liverpool, whereby the companies undertook that at all times in day and night one of certain specified steam-tugs should always be in readiness to proceed, and should on signal given proceed with one of the Liverpool lifeboats to any ship in distress within certain limits; the Board contracting to pay fifteen guineas for each occasion. The agreement contained a proviso that nothing contained in the agreement should prejudice or affect the rights of the steam-tug companies in regard to services in saving ships or other property to be rendered by their steamers.

One of the steam-tugs specified, belonging to one of the companies, in pursuance of a direction received from the mate of the landing-stage, who was a servant of the Dock Board, towed out a lifeboat to a vessel in distress, and brought the master and crew into Liverpool: then returned and brought the ship and cargo in also.

In an action for salvage against ship and cargo instituted by the owners, master and crew of the tug:—*Held*, that the agreement between the Dock Board and the tug companies did not bar or affect the plaintiffs' claim to reward for salvage of life.

July 15.

THIS was a suit of salvage instituted by the owners and crew of the steam-tug *Brother Jonathan* against the ship

Pensacola, freight and cargo for services rendered on the 4th of December, 1863.

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The Pensacola was a ship of 1,421 tons, timber laden; on the 3rd of December, she was caught in a hurricane, and driven on shore upon the Great Burbo Bank at the mouth of the river Mersey; her masts were cut away, and she otherwise sustained great damage.

On the next morning, when the weather had partially moderated, the Brother Jonathan, upon orders received from the mate of the landing-stage at Liverpool, took a lifeboat in tow, and proceeded to the Pensacola, whose crew, to the number of fourteen, were then removed in the lifeboat and put on board the Brother Jonathan and conveyed to Liverpool.

In the afternoon the Brother Jonathan again went to the ship, and with the assistance of another steamer called the Slasher succeeded in bringing her into Liverpool. The value of the property salvaged was 3,339*l.* The defendants paid into Court 150*l.* by way of tender.

The defendants, the owners of the ship and cargo, put in evidence an agreement dated the 4th of August, 1858, between the Mersey Docks and Harbour Board and certain steam-tug companies of Liverpool (including the company owning the Brother Jonathan), whereby the companies undertook that at all times in day and night one of certain specified steam-tugs should always be in readiness to proceed, and should on signal given proceed with one of the Liverpool lifeboats to any ship in distress within certain limits, &c.; the Board contracting to pay fifteen guineas for each occasion. The agreement contained a proviso that nothing contained in the agreement should prejudice or affect the rights of the steam-tug companies in regard to services in saving ships or other property to be rendered by their steamers.

The 109th section of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), passed 12th July, 1858, is as follows:—

“The Board shall provide and maintain such and so many lifeboats or other vessels to be used and established for the purpose of rendering assistance to vessels in distress as they may from time to time think necessary or expedient, and may purchase by agreement, either within the limits of the said port or on the coast adjoining the said port or elsewhere, sites for and build houses and landing-places for the accommodation of such boats, their crews and stores, and also for the shelter and safety of pilot boats, when driven by stress of weather from their stations, as they may think proper.”

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The following sections of the Merchant Shipping Act, 1854, and the Amendment Act, 1862, were also referred to:—

17 & 18 Vict. c. 104 (Merchant Shipping Act, 1854).

Part VIII. *Salvage in the United Kingdom.*

Sect. 458. “In the following cases, (that is to say,)

Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

(1) In assisting such ship or boat;

(2) In saving the lives of the persons belonging to such ship or boat;

(3) In saving the cargo or apparel of such ship or boat or any portion thereof;

And whenever any wreck is saved by any person other than a receiver within the United Kingdom;

There shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck.”

Sect. 459. “Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives.”

In Part III. *Masters and Seamen.*

Sect. 182. “Every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.”

25 & 26 Vict. c. 63 (Merchant Shipping Act
Amendment Act, 1862).

Masters and Seamen (Part III. of Merchant Shipping Act, 1854).

Sect 18. “It is hereby declared that the 182nd section of the

Principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which according to the terms of the agreement is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships."

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Aspinall, Q. C. (Cohen with him).—The plaintiffs are not entitled to life salvage. They acted as the hired servants of the Mersey Docks and Harbour Board, who were performing a statutory duty in entering into the contract with the tug companies. The remuneration provided by the agreement must be taken to be fair and adequate. The reason of public policy which is usually put forward for granting salvage, namely, the encouragement of services, does not apply here, as the performance of the services is secured by the operation of the Harbour Board acting in obedience to the legislature.

Brett, Q. C. (Lushington with him), for the plaintiffs.—The plaintiffs have a statutory right to life salvage by the Merchant Shipping Act. The agreement is immaterial. It does not alter the peril of the men whose lives are saved, nor the value of their lives, nor does it alter the difficulty and peril of the service of the salvors. The merits of the service remain as before. Secondly. The parties who have to pay salvage are strangers to the agreement, which is between the Dock Board and the tug companies. Thirdly. The actual salvors, the master and crew of the tug, are strangers to the agreement. The agreement provides no reward for them, though they may have to risk their lives in the service. The arrangement should not be construed as intending to reduce or take away the reward that may be payable by law for salvage of life: its purpose is rather to supplement that, for in services of life salvage it must often happen that there is no property, or insufficient property, to afford due remuneration, and that even the further reward given by the Board of Trade out of the Mercantile Marine Fund is quite inadequate to encourage such services.

DR. LUSHINGTON.—The Court has to consider whether in this case the plaintiffs are entitled to receive reward for saving life as well as for saving property, and whether the tender which has been made is sufficient. Judgment.

The action is brought on behalf of the owners, master and crew of the tug Brother Jonathan. This tug towed a lifeboat from the landing-stage in the river Mersey to the ship Pensacola, which was stranded on the Burbo Bank outside, and removed

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her crew, fourteen in number, and brought them safely into Liverpool. In a second trip the tug brought in the ship also. Now that these fourteen men of the Pensacola were saved by the Brother Jonathan from a position of considerable peril cannot be disputed. The property has also been saved. In these circumstances, by the ancient law of this Court, the plaintiffs are entitled to sue the ship and cargo for their services, and the Court would in its award take into consideration the services rendered to life as well as the services rendered to property. This was well established. The Merchant Shipping Act leaves that law untouched, or rather confirms it, and goes beyond it; for in express terms it makes the owners of ship and cargo liable to pay salvage for services rendered in saving the lives of the persons belonging to the ship. But I decide this case upon the ancient law of the Court.

It has been argued, however, that the plaintiffs' claim, so far as it relates to life salvage, is barred, because there was an agreement between the Mersey Dock Board and certain tug companies, of whom the owners of the Brother Jonathan was one. The Dock Board, it seems, are empowered by their Act to maintain lifeboats, and they have made this agreement, whereby the tug companies contract that a tug shall be at all times ready to proceed, and shall proceed, on signal given, with a lifeboat to any ship in distress; and the Board contracts to pay fifteen guineas for each occasion.

Now how does this agreement alter the mutual rights of the parties before the Court; the right of these salvors, and the obligation of the owners of ship and cargo? How can it alter the law which otherwise creates this right and that obligation? It is an agreement to which the owners of the ship and cargo are in no way privy, for which they have paid no consideration, and it is one to which the actual salvors, the master and crew of the tug, are equally strangers. It is an agreement, moreover, which does not purport to bar or in any way to affect the claims of the salvors against the property. When examined, it proves to be an arrangement whereby the Dock Board secure proper assistance to their lifeboats, and limit the reward which they, the Dock Board, are to pay: that is the true meaning of it. The right of the salvors against the property given to them by law remains unabridged. But I ought to add, as a further reason for this conclusion, that it has been the practice of this Court not to allow agreements barring salvage, in order that the spirit of enterprise should not be interfered with. It is at all times important—for this is the very foundation of the law of salvage—that salvors should be stimulated by hope of liberal reward to

brave difficulty and danger, and go forth to the succour of vessels in distress. This principle applies with the highest force to those cases in which there is not only property but also life to be saved. Acting upon the well-established law of the Court, I have no hesitation in deciding that this agreement forms no bar to the claim for life salvage, and that I should make my award as if this agreement was not in existence.

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[The learned Judge then considered the facts of the case in detail, and overruling the tender awarded 300*l.*]

Nethersole & Speechly, solicitors for the plaintiffs.

Pritchard & Sons, proctors for the defendants.

In the Privy Council.

Present—LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

THE MASTER OF THE ROLLS.

THE AMALIA.

Collision—Pleading—Evidence—Allegata et probata.

The plaintiffs, in a cause of collision, alleged in their petition, in two separate articles, that the helm of the defendants' vessel was not duly ported, and was improperly starboarded. They also produced witnesses who deposed that the defendants' vessel had starboarded, and that the collision was thereby occasioned. The finding of the Court was that the collision was occasioned by the helm of the defendants' vessel not having been duly put to port.

Held, that the plaintiffs were not barred from recovering by the rule confining the plaintiffs' right to recover *secundum allegata et probata*.

THIS was an appeal from a decision of the High Court of Admiralty in a cause of collision between the *Amalia* and the *Marie de Brabant*. The present report is upon one point only, viz., the rule confining the right of a plaintiff to recover *secundum allegata et probata*. July 12, 23.

The allegations in the petition, so far as are material to this point, were as follows:—

“Third. Shortly before 2.30 A.M. of the 15th day of May,

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1863, the Marie de Brabant was by computation about twenty-four miles off the town and port of Bougie, on the coast of Algiers. The weather at such time was clear and starlight, with a slight haze on the water; it was dead calm, what wind there was being easterly, and there was no tide, and the Marie de Brabant was proceeding under steam alone, at the rate of about eight knots an hour, and steering about S.E. by E.

“Fourth. At such time, and whilst the Marie de Brabant was so proceeding, the mast-head light of a steam-vessel, which afterwards proved to be the above-named screw steam-ship Amalia, was made out at the distance of about four miles from the Marie de Brabant, and about two points on her port bow. The said light was watched from the Marie de Brabant, and as the bearing of such light continued to be about the same, the helm of the Marie de Brabant was ported to give the vessel carrying the said light a wider berth, and the said light was brought to bear about three points on her port bow, when the helm was steadied. The said light was still watched, and got rather broader on the port bow, but no coloured light could be seen until the Amalia had approached to about the distance of half a mile, when her green light came into view, and thereupon the helm of the Marie de Brabant was immediately put hard a-port, and she went off under such hard-a-port helm, notwithstanding which the Amalia ran into and, with her stem and starboard bow, struck the Marie de Brabant a violent blow on her port side, between the main rigging and the funnel.

“Fifth. Whilst the Amalia was approaching the Marie de Brabant as aforesaid, the helm of the Amalia was not duly and properly put to port as it ought to have been.

“Sixth. Whilst the Amalia was approaching the Marie de Brabant as aforesaid, the helm of the Amalia was improperly put to starboard.

“Seventh. The said collision, and the damages and losses consequent thereon, were occasioned by the neglect, default, and want of skill of those on board the Amalia, and no blame with respect thereto is to be attributed to the Marie de Brabant, or any of those on board her.”

The witnesses for the Marie de Brabant deposed in their evidence that the Amalia had starboarded, and that the collision had thereby been occasioned. The case for the Amalia in plea and evidence was that her helm had been ported, and ported only.

The finding of the Court below was in these terms:—“That the collision was caused by the want of adequate care in the

navigation of the *Amalia*. She did not port as she ought to have done. No blame attaches to the *Marie de Brabant*."

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Mr. *Brett*, counsel for the defendants, then took the objection that the plaintiffs' case had throughout been that the collision had been caused by the *Amalia* starboarding; that they had failed to prove that; and that they were consequently not entitled to the judgment of the Court by the rule which limits the plaintiffs' right to recover *secundum allegata et probata*. The learned Judge, DR. LUSHINGTON, overruled this objection, and gave judgment for the plaintiffs.

Brett, Q. C., and *Lushington* for the appellants, referred to *The Ann*(a); *The East Lothian*(b); *The Haswell*(c).

July 12.

The *Queen's Advocate* and Dr. *Deane*, Q. C., for the respondents.

Cur. adv. vult.

On the 23rd July LORD KINGSDOWN delivered the judgment of the Committee.

This case arises out of a collision which took place in the Mediterranean between the *Marie de Brabant* and the *Amalia* on the 12th of May, 1863. They were both screw-steamers, the former of 564 tons and the latter of 1,284 tons.

The *Amalia* was coming from Malta on her voyage to Gibraltar and Liverpool. The *Marie de Brabant* had sailed from Antwerp bound to the East, and having called at Gibraltar was proceeding to Malta. There were actions in the Admiralty Court, where it was decided that the *Amalia* was solely to blame, from which judgment the present appeal was brought.

Two points were urged by the appellants' counsel. They contended:—

1. That, supposing the evidence to justify the finding that the *Amalia* was alone to blame, it did not make out the case alleged in the original petition of the owners of the *Marie de Brabant*, and that they were not therefore entitled to recover.

2. That the evidence did not warrant a finding that the *Amalia* was at all to blame, or at all events that she was solely to blame.

The first objection rested upon this—that the petition of the *Marie de Brabant* alleged an injury which it was said could have happened only by the *Amalia* starboarding, and that it

(a) *Lushington*, 55.

(b) *Lushington*, 241.

(c) *Ante*, p. 247.

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alleged, in point of fact, that the helm of the *Amalia* was improperly put to starboard, and it was pointed out that the Court below had refused to decide whether the *Amalia* had starboarded or not, and yet had given judgment against her.

It is of great importance to the due administration of justice that parties who seek relief in the Court of Admiralty should state the injury of which they complain with sufficient clearness and accuracy to enable their adversaries to know the case which they have to meet, and to prepare their defence accordingly; and, when the plaintiff's allegations have been such as to mislead his opponent upon this essential matter, it has been held by this Committee that the plaintiff was not entitled to recover. As to matters which have taken place on board his own ship, he is enabled to speak, and is reasonably required to speak, with precision and certainty; with respect to what has been done on board his adversary's ship, he can in many cases, probably in most cases, speak of what was done only by inference.

In this case the plaintiffs alleged that the *Amalia* starboarded her helm improperly, but they also formally alleged that her helm was not duly and properly put to port as it ought to have been. The first charge, if proved, necessarily involves the second, but if the first be not proved, the second remains, and, if established in fact, is quite sufficient to sustain the judgment.

The defendants have distinct notice of the charges which they have to meet: first, that they starboarded; secondly, that, if they did not starboard, at all events they neglected to port as they ought to have done.

We are clearly of opinion that this objection cannot be maintained.

[The judgment then considered the evidence in detail, and concluded as follows]:—

If it were necessary to decide the question, therefore, we must hold, upon the balance of evidence before us, that the *Amalia* starboarded her helm and thereby occasioned the accident; but it is sufficient for disposing of this case to say that the appellants have failed to convince us that the judgment below is erroneous either as to the rules of law which were applied, or as to the effect of the evidence.

We must humbly report to her Majesty that the appeal should be dismissed with costs.

Rothery, proctor for the plaintiffs.

Pritchard & Sons, proctors for the defendants.

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THE REGINA DEL MARE.

Proceedings in Rem—Right of Insurers to appear and defend.

The former practice of the Court was to permit only the master or owners of a ship arrested to appear and defend. But the Court will allow the insurers of the ship to defend (on terms) if they show a substantial interest which may be prejudiced by the plaintiff proceeding to judgment.

A ship having been arrested in a cause instituted in the Admiralty Court, and the owners not appearing, the foreign insurers then entered an appearance and applied for leave to defend, upon the ground that if the ship was sold by the Court, they might be made responsible to the owner for a total loss. The Court granted the application upon their giving security for costs.

In another action brought for necessities against the same ship, no appearance having been entered for the owner, the same insurers appeared and paid the amount of the claim into Court, making at the same time an offer to pay costs. The Court rejected a motion on behalf of the plaintiff to sell the ship as for want of appearance.

THIS was a cause instituted against the Genoese barque *Regina del Mare*, on behalf of John Ferguson of Liverpool, agent for the Buenos Ayres Gas Company, the consignees of the cargo laden on board the barque, for alleged breaches of the contract to carry from Liverpool to Buenos Ayres. The ship was arrested in Liverpool, whither she had put back, dismasted, several months before.

No appearance having been entered on behalf of the owner, an appearance was entered on behalf of "The Committee of Insurance Companies of Genoa, the insurers of the ship;" and they filed notice of motion for leave to defend.

In support of this motion they filed an affidavit by one Antonio Oneto, a person holding a power of attorney for the insurance companies, deposing that they had insured the vessel for 3,000*l.* against total loss only (such total loss to be constituted by damage to the extent of seventy-five per cent.); that the owners had abandoned to the insurers, but that the insurers had refused to accept the abandonment; that the Court of Genoa had, in April, 1864, decided in favour of the insurers; and that the case was under appeal. The affidavit also deposed that the insurers had been advised that if the vessel were sold by the decree of the Court they would be rendered liable to pay the insurance.

Dr. *Wambey* on behalf of the Genoese Insurance Companies.—The affidavits show that the insurance companies have an interest to defend this suit, and that the owners have an interest not to defend it. Justice seems to require that these insurers

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should be admitted to defend. If they are not allowed to come in and protect their interest, the Court may practically lend its assistance to the accomplishment of a fraud.

Lushington for the plaintiffs.—It is contrary to the practice of the Court to admit underwriters to appear as defendants in actions brought against a ship: *Cargo ex Galam* (a). They would otherwise appear in almost every case. It is not anybody and every body that is entitled to come in and defend. The warrant by which the ship is arrested calls upon those who “have any right, title or interest in the said ship” to appear. Here the insurers have refused to accept the abandonment. They have therefore no right, title or interest in the ship. They have only an interest in a contract connected with the ship, which, it is submitted, is not enough.

DR. LUSHINGTON [after stating the facts as above].—The sole question is, whether the Genoese Insurance Companies, the insurers of this ship, should be admitted as parties to defend this action. It is alleged that they ought not to be so admitted, because by the ancient practice of the Court the master and owners of the ship arrested were the only persons allowed to appear. It is true such was the ancient practice. But it was always in the power of the Court to accommodate the practice to the justice of the case. I have myself done so, in admitting mortgagees to defend. And now that the jurisdiction of the Court is so enlarged by Act of Parliament, grievous injustice might be done in many cases if insurers were excluded.

I think it right, therefore, to declare that whenever there is a substantial interest which may be prejudiced by the Plaintiff proceeding to judgment, it will be the disposition of the Court to admit the interested party to protect his interest.

In the present case good reason is shown that the insurance companies may be damnified by the event of this cause; and I therefore admit them as parties, upon their giving security for costs.

In another action brought against the same ship by a shipwright for necessaries supplied in Liverpool, the same insurers appeared and paid the amount of his claim into Court, at the same time filing an offer also to pay costs. They then appeared by counsel to oppose a motion which was pending for the sale of the ship as for want of appearance.

(a) Ante, p. 167.

The motion was heard at the same time as the other motion, and was argued by the same counsel.

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The learned Judge refused to order a sale of the ship.

The suits did not afterwards proceed to judgment.

Chester and Urquhart, solicitors for the consignees of cargo.

J. T. & R. Gole, solicitors for the material man.

Thomas Capes and Chadwick, proctors for the insurance companies.

THE LAUREL.

Bottomry—Excessive Charges—Advertisement—Maritime Interest.

The master in a port of refuge consigned the vessel to a merchant to advance money for her repairs, the law of the country allowing a lien on the vessel for such advances ; no agreement was made at the time whether the advance was to be made on personal security or on bottomry ; and the merchant did not himself determine on having bottomry security until shortly before the ship sailed, when he demanded a bond, which the master executed. The Court upheld the bond.

An excessive charge for commissions may be a reason for impeaching a bottomry bond on the ground of fraud, but cannot otherwise affect its validity.

It is proper for the master to advertise previous to taking advances on bottomry ; but a bottomry bond is not invalid if no advertisement has been made.

A bottomry bond, if it expresses a maritime risk, is not invalidated by the absence of any provision for maritime interest.

THE question at issue in this cause was the validity of a bottomry bond upon the *Laurel* and her freight, taken under the following circumstances.

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The *Laurel* belonged to Messrs. Willis, of London, and was returning from Shanghai to London with a very valuable cargo of tea and silk. On the 24th of October she struck upon a rock in the Java Sea : she was got off, but though she did not make much water, the crew refused to navigate her to Europe. The master telegraphed for advice and assistance to the British consul at Batavia, a Mr. Maclachlan, but he declined to intervene, unless the vessel was brought to Batavia and surveyed. Mr. Maclachlan was a partner of the firm of Maclaine, Watson & Co. in Batavia. Accordingly, on the 31st October, the vessel was brought to Batavia and surveyed : the cargo was then discharged, and the vessel put into dock for repairs. As the owner of the ship had no agents in Batavia, the master was in doubt to whom to consign the vessel. He chose the firm of Mac-

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laine, Watson & Co., who were Lloyd's agents at Batavia, chiefly on the ground that they were connected with Messrs. Mac-laine, Fraser & Co., of Singapore, who were the agents of the shipowner in that place, of which fact he informed Messrs. Mac-laine, Watson & Co. The arrangement between the master and Messrs. Mac-laine, Watson & Co. was simply that the firm should advance the money for repairs at two and a half per cent, as the master understood, on the cost of the repairs, and five per cent. upon other disbursements. Whilst the repairs were in progress, the master became aware that Messrs. Mac-laine, Watson & Co. meant to charge a commission of two and a half per cent. upon the value of the cargo, instead of two and a half per cent. upon the cost of the repairs: he protested against this, but received for answer that such a charge was usual.

On the 28th of November, James Mac-lachlan wrote to one of his partners in England:—

“ I forgot to mention to you last mail, that the English ship *Laurel*, bound from Shanghai to London with tea and silk, put in here, having got ashore on Brewer's Reef, and has had to discharge all her cargo. Her owners are John Willis & Sons, 18, East India Chambers, Leadenhall Street, I believe highly respectable people. The captain places his ship in our hands, as Mac-laine, Fraser & Co. are the owners' agents at Singapore. The cargo is a very valuable one, about 1,300,000 f., so that we will get a handsome commission. I am not yet sure if it will not be better to take a bottomry on the vessel, but have written Watson at Singapore, about the owner, and wait his answer before deciding anything.”

Again, on the 13th of December, another of the partners in Batavia wrote to the same partner in London:—

“ The *Laurel* has again her cargo on board and will sail to-morrow. We are now busy settling her account with Captain Garrick, for which he is to give us a draft on his owners, John Willis & Sons, and a bottomry bond as collateral security. We remit said bill and bond to Finlay, Hodgson & Co., who we hope will have no difficulty in collecting said amount. Watson of Singapore wrote Mac-lachlan favourably about said owners, and he would take the captain's bills on them for 1,000*l.* more or less; but, as the expenses incurred amount to more than three times as much, I thought it would be better to take a bond.”

This statement was borne out by the master, who deposed that the first occasion of the subject of bottomry being mentioned to him was on this 13th of December, when one of the partners told him that, besides the draft on the owners for the amount due, he must give a bottomry bond as additional secu-

rity; but that upon the bond no extra commission would be charged. A bond was accordingly on that date given on ship and freight for 4,088*l.* 17*s.* 4*d.* (of which only one-third was for expenses actually incurred, the remainder being made up of commissions). The bond specified no rate of interest, but in other respects was in the usual form. It appeared also that the law of Batavia gave a lien upon the ship for advances made for the purpose of repairs. Upon the arrival of the *Laurel* in London on the 7th of April, 1863, her owners refused to honour the draft of the master; and thereupon the holders of the bond, Messrs. Finlay, Hodgson and Co., arrested the vessel and instituted the present suit for the enforcement of the bond.

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Dr. *Deane*, Q.C., and *E. C. Clarkson*, for the plaintiffs, argued that the bond was good upon the grounds stated in the judgment; and insisted in particular upon the fact that the advance was not made upon any agreement of personal credit, and that the law of Java gave the merchant a lien on the ship for his advances: *The Alexander* (a); *The Prince George* (b).

Brett, Q.C., and *Lushington*, for the defendants, contended that there was an agreement for an advance on personal credit, and that the bond was really taken only to cover the extravagant commissions. At any rate there was no pre-agreement for bottomry, and such is necessary upon authority, and for reasons of fair dealing: *The Hersey* (c).

There is no proof that the law of Java gave a lien for the commissions; and the power of arrest, or even actual arrest, will not support a bottomry bond: *The Augusta* (d); *The Osmanli* (e); *The Aurora* (f).

As the advances were made without agreement, there was no necessity for the subsequent bond: *The N. R. Gosfabrick* (g); *The Oriental* (h).

Dr. *Deane*, Q.C., replied.

Cur. adv. vult.

DR. LUSHINGTON.—One of the arguments against the bond was the absence of advertisement. This is sometimes an ingredient in evidence of fraud, in cases where it is proved that the money might have been had on better terms. But this is not the present case, and though advertisement is always

Dec. 13.

Judgment.

(a) 1 Dods. 278, 280.

(b) 4 Moore, P. C. 25.

(c) 3 Hagg. 412; 3 Moo. P. C. 83.

(d) 1 Dods. 283.

(e) 3 Wm. Rob. 198, 215.

(f) 1 Wheaton, 104.

(g) Swab. 344.

(h) 7 Moore, P. C. 409.

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expedient, I cannot say that it is indispensable. It is of importance to consider what passed between the parties at the time when Maclaine, Watson & Co. accepted the consignment of the vessel. In my judgment, there was nothing beyond an arrangement (and that not a distinct one) as to the commission to be charged; not a word was said by either party as to the security upon which the advance should be made, whether upon bottomry or upon the personal security of the owner. No mention of bottomry was made to the master until the repairs had been completed and the bond was presented for execution; an omission for which, though it may not invalidate the bond, I think Messrs. Maclaine, Watson & Co. were, in fair dealing, greatly to blame. It is most desirable that both the merchant and master should, at an early stage in the proceedings, have a distinct understanding whether the advances are to be made on personal credit or upon bottomry. Upon consideration of all the facts, I think that this case cannot be distinguished from that of the *Alexander* (a): in both there is the absence of any agreement to advance on personal credit; and of waiver, direct or indirect, of the right by the *lex loci* to make the ship liable for her repairs. The fact that in the present case Messrs. Maclaine, Watson & Co. were doubtful, almost up to the last, whether they should take a bottomry bond or not, does not, I think, constitute a substantial difference. On the other hand, this case is distinguishable from that of the *Augusta* (b). There Lord Stowell refused to allow a bottomry bond, so far as it covered an advance which had been made upon personal credit; here there was no agreement that the advance should be upon personal credit.

Then, as to the terms of the bond itself, I do not think the absence of any provision for bottomry premium is material, inasmuch as the maritime risk is clearly expressed.

Lastly, the large amount of the commissions charged is no reason for invalidating a bottomry bond altogether, unless the bond is impeached on the ground of fraud, which is not the case here.

I shall therefore pronounce for the validity of this bond and refer the accounts to the Registrar and Merchants in the usual way. I reserve the question of costs.

Toller & Son, proctors for the plaintiffs.

Cotterill & Sons, solicitors for the defendants.

(a) 1 Dods. 278.

(b) 1 Dods. 283.

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November 28.

THE VOLANT.

Rights of Second Mortgagee of Part of a Vessel, and Rights of the Owner of the Residue—Costs and Damages—17 & 18 Vict. c. 104, s. 71; 24 Vict. c. 10, ss. 11, 35.

The second mortgagee of 32-64th shares of a vessel instituted a cause under the 11th section of the Admiralty Court Act, 1861, and arrested the ship. He afterwards withdrew the suit. The owner of the remaining shares (who was not mortgagor to the plaintiff) thereupon applied to the Court to condemn the plaintiff in costs and damages. *Held*, that he was entitled to his costs of suit, but not to any damages occasioned by the arrest and detention of the vessel.

ON the 24th October, 1864, a cause was instituted under the 11th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), on behalf of John Taylor as registered mortgagee of 32-64th shares of the vessel Volant, and on the 29th October he caused the vessel to be arrested. The mortgage was dated the 4th July, 1864, and was registered on the 18th July. It was given to secure the payment of a bill of exchange for 137*l.* 8*s.* 3*d.*, due 4th September, 1864, and of any renewal or renewals thereof, and of any bill or bills to be given in substitution thereof. The mortgagor, John Richard Davies, covenanted that the shares mortgaged were free from incumbrances, save as appeared by the registry of the said ship. The affidavit to lead the warrant stated that no portion of the amount secured by the mortgage had been paid.

On the 5th November an appearance was entered on behalf of James Lee, as the first registered mortgagee. His mortgage was upon the whole vessel, and was registered on the 19th May, 1864.

On the 8th November an appearance was entered on behalf of William Laugharne, the owner of the 32-64th shares, which were not mortgaged to the plaintiff.

On the 24th of November notice of motion was filed on behalf of the defendant Laugharne, for an order to release the vessel and to condemn the plaintiff, John Taylor, in the costs and damages occasioned by the arrest and detention of the vessel. In support of this motion was filed on the same day an affidavit (to which was annexed a copy of the vessel's register) deposing that the prior mortgage to Lee was still outstanding; that by the terms of that mortgage the statutory power of sale was not to be exercised until the 9th of May, 1866; and that a good freight to

1864. the West Indies had been lost by the arrest of the vessel. The
 November 28. record on the register of the mortgage to Lee did not state the postponement of the power of sale.

On the same date, 24th November, notice of motion was filed on behalf of Lee, the first mortgagee, praying the Judge to fix a time for filing the petition on behalf of the plaintiff.

On the 26th November, the plaintiff filed a notice that "the plaintiff proceeds no further herein, this cause having been settled." On the notice filed was indorsed a memorandum that copies had been served on both the adverse proctors.

The plaintiff also extracted a release of the vessel.

On the 29th November, the motion on behalf of the defendant, Laugharne, to condemn the plaintiff in costs and damages came on to be heard. No counsel appeared on behalf of Lee, the first mortgagee. No appearance had been entered on behalf of Davies, the mortgagor to the plaintiff.

The following enactments were referred to :—

24 Vict. c. 10.

Sect. 10. "The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said Court or not."

Sect. 35. "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104).

Sect. 71. "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some Court capable of taking cognisance of such matters, sell such ship or share without the concurrence of every prior mortgagee."

Lushington in support of the motion.—The arrest of the ship was necessarily wrongful, for as to the 32-64th shares held by the defendant, the plaintiff had no claim. Neither could the plaintiff have obtained an order from the Court for a sale of the shares which were mortgaged to him, for they were subject to the prior mortgage. The alternative mode of proceeding in rem or in personam given by 24 Vict. c. 10, did not justify the plaintiff in

arresting the ship. The defendant, who owed nothing to the plaintiff, ought, it is submitted, to be recouped the loss he has suffered by the conduct of the plaintiff: *Victor (a)*. 1864. November 28.

Clarkson, contra, for the plaintiff.—The rule laid down by the Privy Council in the *Evangelismos (b)* shows that the defendant is not entitled to damages. The plaintiff was not a wrongdoer in arresting the ship. His mortgage money was due, and by the 24 Vict. c. 10, he was authorized to proceed in this Court in rem. If the case had proceeded, this Court might, if it so pleased, have granted a sale of the mortgaged shares. That the defendant should suffer for the default of his co-owner is to be regretted; but that is an incident of co-ownership, not the plaintiff's fault. The settlement of the cause is a boon to the defendant, of which he ought not to complain.

DR. LUSHINGTON.—The plaintiff having withdrawn his suit, Judgment. he is liable to pay the costs to which he has put the defendant. But the present motion goes further. The defendant asks that the plaintiff be condemned in the “costs and damages occasioned by the arrest and detention of the vessel.” To this I cannot accede. It is a well-established rule in this Court that damages for arresting a ship are not given, except in cases where the arrest has been made in bad faith, or with crass negligence. One reason for this may be that the appointed mode of suing in this Court is by arresting the property: another that the property arrested may be released at once upon bail, and therefore the damages are usually inconsiderable. The cases, at any rate, are few in which an unsuccessful plaintiff has been condemned in damages; and the Court is reluctant to condemn a plaintiff to that extent, except the circumstances show that justice requires it. The case of the *Victor (a)*, which has been referred to, was one in which, in a cause of collision, the plaintiff endeavoured to make the cargo of the opposing ship liable for his loss—a mere experiment, and an experiment contrary to the long practice of the Court, and the elementary principles of law.

But in this case I am not satisfied that the plaintiff, who was second mortgagee of 32-64th shares, had not right to proceed as he did, to arrest the vessel. It is admitted that he held this mortgage and that the mortgage money was due, and that the Court has jurisdiction over any claim in respect of any mortgage duly registered. It is clear also that, without the intervention of

(a) Lushington, 72.

(b) Swabey, 378.

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the Court, the plaintiff could not (without the concurrence of the prior mortgagee) have realized his security by selling the shares which were mortgaged to him. There is hardship, I admit, in the arrest of the whole vessel for a claim which extends to part of the vessel only. There might also have been difficulty in ultimately decreeing the sale of these shares at the prayer of a second mortgagee. These difficulties are incidental to the conflicting rights of the different parties. It is not necessary, however, that I should dwell on them further, because all I decide is that this case is not, in my opinion, one for giving damages for the arrest. The defendant will have the costs of the motion.

Clarkson, Son & Cooper, proctors for the plaintiff.

Deacon, Son & Rogers, proctors for the defendant.

In the Privy Council.

Present — LORD KINGSDOWN.

LORD JUSTICE KNIGHT BRUCE.

SIR EDWARD RYAN.

THE CONSTITUTION.

Practice of the Judicial Committee in reviewing Judgments of the Admiralty Court upon questions of fact.

In reviewing a judgment of the High Court of Admiralty upon questions of nautical fact, the Judicial Committee will decline to alter the sentence, unless they are impressed with a reasonable conviction that it is wrong.

Regarding the case as one of much doubt, but not being satisfied that the decision of the Court below was erroneous, the Judicial Committee affirmed the judgment, but without costs.

July 23.

THIS was an appeal from the decision of the learned Judge of the High Court of Admiralty in a cause of collision which occurred between two British ships, the *George Dean* and the *Constitution*, on the evening of the 11th of February, 1864, near the Skerries, off the coast of Anglesea.

Both were sailing ships. The *George Dean* was outward bound from Liverpool, and it was admitted was close-hauled on the port tack; the *Constitution* was inward bound, but her

course was disputed, her own crew deposing that she was close-hauled on the starboard tack, whilst the witnesses on the other side deposed that she was running free: neither party acted until the last moment.

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The sailing rules referred to in the arguments and judgment were the following:—

Art. 11. If two sailing ships are meeting end-on or nearly end-on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. 12. When two sailing vessels are crossing so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side; except in the case in which the ship with the wind on the port side is close-hauled and the other ship free; in which case the latter ship shall keep out of the way: but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Art. 18. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course, &c.

The Court of Admiralty held, that the *George Dean* was solely to blame for the collision. From this judgment the owners of the *George Dean* appealed.

The principal point in dispute was the course which was being steered by the *Constitution*.

Brett, Q. C., and *Lushington*, for the appellants.

Dr. Deane, Q. C., and *E. C. Clarkson*, for the respondents.

The following cases were cited upon the treatment of appeals on matters of fact: *The Julia* (a); *Schwalbe* (b); *Araxes* (c); *Falkland* (d).

On the 23rd July, LORD KINGSDOWN delivered the judgment of the Committee.

The first point to be considered in this case is whether the questions of law which arose in it were properly decided by the learned Judge, and the questions of fact upon which the decision

(a) *Lushington's Rep.* p. 224.

(b) *Ibid.* p. 239.

(c) 15 *Moore*, P. C. 122.

(d) *Ante*, p. 204.

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depends were accurately stated in his summing-up to the Trinity Masters.

Upon this subject we entertain no doubt whatever. We agree with the learned Judge that in the courses in which these vessels met, the 11th of the new Navigation Rules has no application, and that the 12th rule must determine the rights of the parties. The vessels were not meeting end-on, or nearly end-on, and the only question is,—which was bound to get out of the way? Now the rule prescribes that when two sailing-vessels are crossing so as to involve risk of collision, then if they have the wind on opposite sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case the latter ship shall keep out of the way.

In this case there is no doubt that the ships were crossing; that they had the wind on opposite sides, the Constitution on the starboard side and the George Dean on the port side. It was therefore the duty of the George Dean to get out of the way, unless the Constitution had the wind free. This is stated by the learned Judge to the Trinity Masters to be the only question in the case, and we entirely agree with him.

In dealing with the effect of the evidence we are involved in the greatest difficulty. It depends partly upon the credit due to the witnesses, of which we have but imperfect means of judging, and partly on the inferences which persons of nautical skill, of which we are necessarily destitute, may draw from facts which are established. The Court below saw the witnesses; the Trinity Masters, of whom one was Admiral Collinson, a seaman of the greatest distinction, personally examined the witnesses, and would be far better able to understand them, and to judge of the probability or improbability of their story, than it is possible for us to do even with the assistance which we receive from the able naval officers who are ordered to attend the Committee in these cases.

It was argued by Mr. Brett that an appeal in the Judicial Committee is not like an application to a Court of Law for a new trial, where, if there be evidence to warrant the verdict, the Court will often not disturb the finding of the jury (to whom the decision of the fact belongs) though it may not entirely approve of it; that here we are sitting not only as Judges but as a jury, from which it was inferred that in order to affirm we ought to be satisfied that the finding is that at which we should have arrived if the matter were *res integra*.

We do not agree to that principle. We laid down in the case

of the *Julia* (a), in the year 1861, the rules by which we must be guided. The practice of the Court of Admiralty does not allow of new trials; and considering that from the pursuits and habits of life of seamen, on whose testimony the questions of fact usually depend, it would generally be impossible in such cases to collect them again for a second trial, as well as for other reasons, we think the rule a wise one. We must either affirm or alter a sentence on appeal, and those who call upon us to alter it must impress us with a reasonable conviction that it is wrong. We certainly are unable to arrive at that conviction in the present case. The evidence is entirely contradictory upon many points, but in some, where the contradiction is the strongest, there seems to us to be reasons for thinking that the error is rather on the side of the appellants than of the respondents.

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[His Lordship then examined the evidence in detail and concluded]:—

Upon the whole, though we think the case one of much doubt, we cannot be satisfied that the decision below is erroneous. We must humbly report to her Majesty our opinion that it ought to be affirmed, but without costs.

Pritchard & Sons, proctors for the appellants.

Rothery, proctor for the respondents.

(a) Lushington, 224.



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In the Privy Council.

Present—LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THE BETA.

Pilot's Licence—Renewal of—17 & 18 Vict. c. 104, s. 374.

The 374th section of "The Merchant Shipping Act, 1854," provides that no licence granted by the Trinity House shall "continue in force beyond the 31st day of January next ensuing the date of such licence; but the same may, upon the application of the pilot holding such licence, be renewed on such 31st day of January in every year, or any subsequent day, by indorsement under the hand of the Secretary of the Trinity House, or such other person as may be appointed by them for that purpose."

Held, that a pilot's licence, renewed by indorsement made on the 22nd of January, operated a renewal from the 31st of January, and was therefore in effect on the 6th of May following.

THIS was an appeal from the judgment of the High Court of Admiralty in a cause of damage brought by the owners of the barque *Fides* against the owners of the screw steamship *Beta*, in respect of a collision which occurred between those vessels on the 6th May, 1864, in the River Thames.

One of the defences pleaded by the owners of the *Beta* was that the collision was solely caused by the default of the pilot, who was employed by compulsion of law. The place of collision was in the London district of the Trinity House, as defined by the 370th section of the Merchant Shipping Act. The *Beta* was at the time carrying passengers from London to Waterford, and by the 376th section the employment of a qualified, that is, a duly licensed pilot, was compulsory.

The cause was heard before DR. LUSHINGTON and Trinity Masters.

It was proved at the trial that the pilot James Voss came on board the *Beta* in the usual manner at East Lane Tier and took charge, and was acting in charge of the ship at the time of the collision. On the production of his licence, an objection was taken to its sufficiency under the 374th section of the 17 & 18 Vict. c. 104. The certificate had been originally granted in 1855, and had been renewed on an early day in January in each year. Each renewal was indorsed and was in the same terms, the last one being—"Renewed, pursuant to the Merchant Shipping Act, on the 22nd day of January, 1864."

A fee of three guineas had been paid by the pilot to the Trinity House upon each renewal.

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The following sections of the statute (17 & 18 Vict. c. 104) were cited :—

Sect. 2. “Qualified pilot shall mean any person duly licensed by any pilotage authority to conduct ships to which he does not belong.”

Sect. 374. “Subject to any alteration to be made by the Trinity House, no licence granted by them shall continue in force beyond the 31st day of January next ensuing the date of such licence; but the same may, upon the application of the pilot holding such licence, be renewed on such 31st day of January in every year, or any subsequent day, by indorsement under the hand of the Secretary of the Trinity House, or such other person as may be appointed for that purpose.”

Sect. 376. “Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory, are the London district and the Trinity House outport districts, as hereinbefore defined: and the master of every ship navigating within any part of such district or districts, who, after a *qualified pilot* has offered to take charge of such ship, or has made a signal for that purpose, either himself pilots such ship without possessing a certificate enabling himself so to do, or employs or continues to employ an unqualified person to pilot her, shall for every such offence, in addition to the penalty hereinbefore specified, &c.”

Sect. 388. “No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any *qualified pilot* acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.”

No alteration had been made by the Trinity House under either the 374th or the 376th section.

The Solicitor-General (Sir R. Collier) and *Lushington*, for the plaintiffs.—The licence is bad, and the employment of the pilot was therefore not compulsory. The 374th section appoints that all licences shall expire on the 31st of January in each year; that they may be renewed on that day or on any subsequent day. Here the licence was renewed on a prior day. But if the renewal was good, and gave a new date to the licence, it would not continue in force “beyond the 31st day of January next ensuing.” It had therefore expired before the date of this collision.

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Dr. *Deane*, Q.C., and *Clarkson*, for the defendants.—It cannot have been the intention of the statute that all the pilots should come to the Trinity House on the 31st of January every year, to have their licences renewed. If so, either there could be no pilots at sea that day or for days previous, or, if any pilots were at sea that day, they would be without their licences, and have no lawful authority. It must have been intended that a pilot should be able to get the indorsement of renewal made before his licence expired: the renewal itself would operate from the 31st January. The indorsement is to be made “upon the application of the pilot holding such licence.”

The Court having found that the collision was occasioned solely by the fault of the pilot of the Beta, DR. LUSHINGTON said:—

It remains for me to determine whether the pilot was duly licensed within the terms of the 374th section of the Merchant Shipping Act.

The licence which I hold in my hand was originally given in the year 1855; and it conferred a licence from thenceforth up to the 31st January next ensuing and no longer. There have been several renewals of this licence, and the last of them was on the 22nd January, 1864. The collision took place on the 6th May, 1864.

It has been contended by the Solicitor-General that this renewed licence only lasted till the 31st January, 1864; that, consequently, at the time of the collision, there was no operative licence; that the pilot was not duly licensed; that he was not employed by compulsion of law; and that his employers are responsible for his act. On the other hand it is urged that the pilot was duly licensed according to the section.

I am obliged to confess that both the proposed constructions of the section are unsatisfactory, though in different respects. If, however, very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively forbid, it is the duty of the Court to prefer the construction *ut res magis valeat quam pereat*.

It is argued by the counsel for the defendants, that, if the construction urged by the Solicitor-General be adopted, it will be next to impossible to get any licensed pilot in the month of January in every year; for all the pilots would be compelled to come to town with their licences for the purpose of getting them renewed.

It must be recollected that a pilot cannot separate himself

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from his licence ; because he is bound to have his licence with him, and to produce it when he boards a vessel and takes charge of her. That difficulty has been most rightly urged. It would be a matter of the greatest inconvenience to navigation that pilots should be without licences, or should be compelled to come in a body for the purpose of renewing them.

On the other hand, I am aware that if I adopt the construction of Dr. Deane, I declare that the licence may be renewed at any time during the year of its currency, whereas it would appear to be consonant both to the terms and the intention of the Act, that the licence should not be renewed until the appointed time for its expiration, and when the conduct of the pilot has been such as to merit the renewal of such licence.

The section begins with these words :—"Subject to any alteration to be made by the Trinity House, no licence granted by them shall continue in force beyond the 31st day of January next ensuing the date of such licence." This is plain enough as applied to an original licence ; but the question is, what is the meaning of the words "date of such licence," when applied to a renewed licence ? The section continues,—“but the same may, upon the application of the pilot holding such licence, be renewed on such 31st day of January in every year, or on any subsequent day, by indorsement under the hand of the Secretary of the Trinity House, or such other person as may be appointed by them for that purpose.” These words admit of the interpretation that the indorsement of renewal is the renewal, and cannot be made except on the 31st of January, the day on which the licence would expire, or on some subsequent day. But as obvious mischief such as I have pointed out would ensue from this construction ; as the section speaks of application by the pilot holding such licence, that is, during the currency of the licence, and contains nothing to forbid the indorsement operating from the expiration of the old licence, I consider myself justified in deciding, that as this application for a renewal was made while the licence was still in force, and the indorsement of renewal was made thereupon, such renewal operated from the 31st of January, the date upon which the subsisting licence expired.

I therefore hold this pilot to have been duly licensed, and dismiss the action of the plaintiffs ; but as usual in these cases without costs.

The *Queen's Advocate* (Sir R. Phillimore) and the *Admiralty Advocate* (Dr. Twiss, Q.C.), for the appellants.—The exemption from responsibility claimed by the respondents does not apply unless the pilot was a qualified, that is, a duly licensed pilot.

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We submit that this pilot was not duly licensed. The 374th section provides in effect that all licences original or renewed expire on the 31st of January in each year; and that a licence can be renewed on the date of its expiration or on any subsequent day. Here the licence was renewed before its expiration; and if the renewal was then valid it operated only until the 31st January "next ensuing."

The interpretation given in the judgment below to the word "renewed," separating the form of renewal from the effect of renewal, is not justified by the language of the section or by the practice of the Trinity House. If this renewal dated "22 January" takes effect from the ensuing 31st January, does a renewal dated "1 Feb." take effect from the 31st January of the following year? If the point be doubtful, the decision should be against the liability of the subject to a penalty, that is, against the compulsory pilotage.

Dr. *Deane*, Q. C. and *Clarkson*, contrà.—We submit that the judgment below was correct. There is nothing unreasonable in the indorsement taking place at one date, and the renewal taking effect at another; and when the nature of the pilot service is considered, and especially the fact that the pilot when at sea must carry his licence with him as his authority, *Hammond v. Blake* (a), nothing can be more reasonable, or even more necessary. The date it will be observed in the statute goes with "renewed," and not necessarily with the words "by indorsement." Whether the indorsement operates immediate renewal or not depends upon whether the original licence is subsisting or not. But, secondly, whether the pilot was duly licensed or not, he was employed under the belief, and the reasonable belief, that the law required it; he was not voluntarily employed by the respondents, he was not their servant, and they ought not to be responsible for his act. The express statutory exemption is founded upon this, that the pilot is imposed upon the ship without the will of the owners; *Diana* (b); and the Judge of the Admiralty Court has held, that the statute only gives expression to the exemption which exists independently by the true doctrine of principal and agent; *Maria* (c); *Annapolis* (d); that exemption would apply here.

Judgment.

LORD JUSTICE TURNER delivered the judgment of the Committee.

This case depends mainly, if not entirely, upon the construc-

(a) 10 B. & C. 424.

(b) 4 Moore, P. C. 17.

(c) 1 W. Rob. 107.

(d) Lushington's Rep. 312.

tion to be put upon the 374th section of the Merchant Shipping Act, 17 & 18 Vict. c. 104. The section is in these terms (his Lordship read the section, ante, page 329). To say there is no difficulty in the construction of this section would be going perhaps a little too far; but their Lordships have arrived at a clear conclusion upon what is the right construction. It seems to their Lordships that the section admits of two constructions, at least that part of it which it is necessary to consider upon the present occasion, namely, that part which refers to the renewal of the licence. It may either mean that the act of renewal is to be done on the 31st of January next ensuing, or any subsequent day, or that the effect of the renewal when made is to be from the 31st January, or from the subsequent day on which the renewal may be made, and the question seems to their Lordships to depend upon whether the act of renewal, or the effect of renewal, was what the legislature was looking to at the time the statute was framed; and they are of opinion that what the legislature intended was the effect of the renewal, whether made on the 31st January or any subsequent day. That construction falls in with the provision of the 388th section of the Act, by which the owners of a ship are exonerated from liability by the fault or incapacity of any qualified pilot acting in charge of the ship.

It never could, in their Lordships' estimation, have been the intention of the legislature that the master or shipowner's liability should depend upon the date when the pilot's licence should have been renewed by the Trinity House, whether it was renewed before or after the 31st January in any year; but it might well depend upon the circumstance of the renewal taking effect before or after the 31st January. Again, the construction of the 374th section which their Lordships are giving falls in with the general convenience and almost the necessity of the case, because it is obvious that the greatest possible inconvenience must result in all cases, if the construction contended for on the part of the appellants in this case could be maintained; for the necessary consequence would be that from a certain period, certainly hours, probably days, and possibly weeks, there would be no qualified pilots within particular parts of the district to which the Act of Parliament applies. Looking, therefore, to the language of that section and the inconvenience that would result from the construction contended for by the appellants being maintained, their Lordships agree entirely with the learned Judge of the Admiralty Court from whose decision this appeal has been

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brought, and think that the appeal should be dismissed and with costs.

Stokes, proctor for the appellants.

Clarkson, Son & Cooper, proctors for the respondents.

THE MARY ANNE.

Salvage—Jurisdiction on Appeal from Justices—“Sum in Dispute”—17 & 18 Vict. c. 104, s. 464.

The 464th section of the Merchant Shipping Act provides that no appeal shall be allowed from a salvage award of justices, “unless the sum in dispute exceeds 50*l.*” *Held*, that the “sum in dispute” means the sum claimed by the salvors (a).

Salvors sent in a formal demand in writing for 40*l.*; on this being refused, they claimed before the justices “a sum not exceeding 200*l.*” The justices found no salvage was due; the salvors appealed to the Admiralty Court.

Held, that “the sum in dispute” was the 40*l.* thus claimed, and that therefore the Admiralty Court had no jurisdiction to entertain the appeal.

March 3.

THIS was an appeal from the award of two justices of the peace at Southampton in an alleged cause of salvage, and the respondents questioned the jurisdiction of the Admiralty Court on the ground that “the sum in dispute” did not exceed 50*l.*, and that therefore under the 464th section of the Merchant Shipping Act no appeal should be allowed. The facts were as follow:—

A dispute arose between the master of the *Mary Anne* and the alleged salvors, as to whether anything or what was due for salvage: the salvors sent in a formal claim, as follows:—

“ Dock Chambers, Canute Road,
Southampton, ——— 1863.

Captain and owners brig *Mary Anne* drs. to the Southampton Steam Towing Company (Limited).

Dec. 31. To towing of ship’s boat to brig, towing
brig off Brambles, thence to Bri-
tannia Wharf £40:0*s.* 0*d.*”

When the salvors came before the justices of the peace, they

(a) See 9 & 10 Vict. c. 99, ss. 21, 23, repealed by 17 & 18 Vict. c. 120.

demanded no specific sum ; but as appeared from the award of the justices, they “ claimed a sum not exceeding 200*l.*,” that sum 200*l.* being the extreme sum that could be claimed before the justices under the 460th section of the Merchant Shipping Act. The justices were of opinion that no salvage was due, and awarded accordingly.

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The 464th section of the Merchant Shipping Act is as follows :—

“ If any person is aggrieved by the award of such justices or such umpire as aforesaid, he may in England appeal to the High Court of Admiralty of England, in Ireland to the High Court of Admiralty of Ireland, and in Scotland to the Court of Session ; but no such appeal shall be allowed unless the sum in dispute exceeds 50*l.*”

Dr. *Deane*, Q. C., and *Lushington*, for the salvors, argued that the “ sum in dispute” was the sum claimed before the justices, which ought to be treated as 200*l.*, notwithstanding the previous claim for 40*l.*

The *Admiralty Advocate* and *Clarkson*, for the defendants, argued that the “ sum in dispute” was the sum originally claimed, viz. 40*l.*

DR. LUSHINGTON.—In the case of the *Andrew Wilson* (a), I held that the “ sum in dispute” was not the sum awarded by the justices but the sum claimed by the salvors. Now I lay out of my consideration all loose expressions which may have occurred in conversation between the master of the *Mary Anne* and the salvors ; but it is clear that the salvors made a formal demand in writing for 40*l.* The plaintiffs by making this demand may not absolutely have debarred themselves from suing for a larger sum ; but their demand from the justices was not for a sum exceeding 50*l.*, but for a sum not exceeding 200*l.* I think this must be taken to have reference to the previous claim of 40*l.*, and therefore to constitute “ the sum in dispute.” The Court accordingly cannot entertain this appeal. It has been contended that the objection to the jurisdiction has been taken too late ; but I apprehend if at any time the Court discover it has no jurisdiction, it cannot proceed further : the delay of one or both parties cannot confer jurisdiction. The appeal must be dismissed with costs.

Judgment.

Waddilove, proctor for the appellants.

Clarkson, Son & Cooper, proctors for the respondent.

(a) Ante, p. 56.

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THE SPIRIT OF THE OCEAN.

*Limited Liability—Registration—"Owners"—25 & 26 Vict.
c. 63, s. 54.*

The word "owners" in the 54th section of the 25 & 26 Vict. c. 63, which gives limited liability in certain cases to "the owners of any ship," includes un-registered as well as registered owners.

If the loss is occasioned by the actual fault of one of several part-owners, his co-owners are not thereby precluded from a right to the limited liability given by the statute.

On the 24th July, Cary junior, a registered part-owner of a vessel, transferred his shares, by bill of sale, to Cary senior. This bill of sale was not registered until after the 22nd November, on which day a collision took place, Cary junior being on board and in command of the vessel as master. It was not denied that he personally was in fault. On a cause for limited liability being instituted by Cary senior, and by all the registered owners of the vessel except Cary junior:

Held, that they were all entitled to the privilege of limited liability given by the statute.

A CAUSE (No. 2453) having been instituted on the 23rd November, 1864, by the owners of the Robin Hood against the Spirit of the Ocean to recover damages occasioned by a collision between those two vessels, this cause was instituted by the owners of the Spirit of the Ocean under the 12th section of the Admiralty Court Act, 24 Vict. c. 10, and the 514th section of the Merchant Shipping Act, 1854, for the purpose of limiting their liability for damage to ship and goods according to the 54th section of the Merchant Shipping Act Amendment Act, 1862, and distributing the fund amongst the various claimants. Roulle Cary jun., the master of the Spirit of the Ocean, had in the month of January, 1864, become the registered owner of six sixty-fourths of the ship. On the 24th of July following, he by bill of sale transferred his shares to his father, Cary sen. On the 22nd of November, 1864, the collision took place; at the time of the collision, Cary jun. was on board, and in command of the ship, and it was not denied that the collision was occasioned by his fault. The bill of sale of his shares to his father had not then been registered, and was not registered until the 30th of November. The cause for limited liability was instituted on the 2nd December by Roulle Cary sen. and by the registered owners of the remaining fifty-eight sixty-fourth shares.

The sections of the statute 25 & 26 Vict. c. 63, material to the argument and judgment, are as follows:—

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Sect. 1. "This Act may be cited as the Merchant Shipping Act Amendment Act, 1862, and shall be construed with and as part of the Merchant Shipping Act, 1854, hereinafter termed the principal Act."

Registry and Measurement of Tonnage. (Part II. of Merchant Shipping Act, 1854.)

Sect. 3. "It is hereby declared that the expression 'beneficial interest' whenever used in the second part of the principal Act includes interests arising under contract and other equitable interests; and the intention of the said Act is that without prejudice to the provisions contained in the said Act for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners or mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein, in the same manner as equities may be enforced against them in respect of any other personal property."

Limitation of Shipowners. (Part IX. of Merchant Shipping Act, 1854.)

Sect. 54. "The owners of any ship, whether British or foreign, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say,—

- (1) Where any loss of life or personal injury is caused to any person being carried in such ship;
- (2) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship;
- (3) Where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat;
- (4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat;

be answerable in damages in respect of loss of life or personal

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injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; such tonnage to be the registered tonnage in the case of sailing ships, and in the case of steam ships the gross tonnage without deduction on account of engine-room."

Clarkson for the plaintiffs.

Lushington for the defendants, the owners of the *Robin Hood* and her cargo.—Limited liability is given by the statute only, 25 & 26 Vict. c. 63, and here the statute does not apply. 1st. The word "owners" throughout the Merchant Shipping Act and the Amendment Act means "registered owners:" equitable owners are spoken of as persons "beneficially interested in ships" (17 & 18 Vict. c. 104, s. 100). The 3rd section of the Amendment Act only provides that "equities may be enforced against owners and mortgagees of ships." Cary the father is, therefore, not entitled to limited liability; but is as responsible as if there were no such statute: *Nostra Signora de los Dolores* (a).

2ndly. Cary the son, being a registered part-owner, was one of the "owners of the ship" within the statute; and the loss was occasioned by his fault. The other registered part-owners therefore, it is submitted, are not entitled to limited liability. The statute says, "The owners of any ship shall not, in cases where loss occurs without their actual fault or privity, be answerable to an aggregate amount exceeding, &c." These terms point to a collective liability, especially when contrasted with the terms of former enactments respecting limited liability: 53 Geo. III. c. 159, s. 1; 17 & 18 Vict. c. 104, s. 504.

E. C. Clarkson, in reply.—The word "owners" in the Merchant Shipping Act and Amendment Act means equitable as well as registered owners: sections 18, 38, 39, 42, 43, 44, 56, 58, 62, and 516 of the Merchant Shipping Act, 1854. Such at any rate must be its meaning here; for the section would otherwise be nugatory as applied to foreign ships, notwithstanding they are expressly included. Cary senior is therefore entitled to the benefit of the statute.

(a) 1 Dodson, 297.

In any case the other registered co-owners cannot be prejudiced by the act of Cary junior, even if he is "owner." The collision did not take place by "their actual fault;" co-owners of a ship are not a corporation nor are they partners.

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By the 13 & 14 Vict. c. 21, s. 4, the Act "for shortening the language used in Acts of Parliament," the plural includes the singular unless the contrary is expressly provided. Here the obvious intention of the statute is to give limited liability to each part-owner. This is established by the history of the privilege: *Wilson v. Dickson* (a); 17 & 18 Vict. c. 104, s. 504.

Cur. adv. vult.

DR. LUSHINGTON [after stating the facts].—If the word "owners" in this section meant registered owners only, I should still hold that the fault of Cary the son, who was a registered part-owner, could not deprive the absent co-owners of the right of limited liability. To hold otherwise would be contrary to the principle of this statute, and I may say all the other statutes conferring the right of limited liability, for the only ground of exception to this right which is prescribed is "actual fault or privity." The very purpose of all these statutes has been to limit the responsibility of one man for the act of others. I think the judgment of *Wilson v. Dickson* (a) is applicable here, although given upon the words of an earlier statute. It is true that there is a difference in the phraseology of the statutes, as pointed out in the argument, yet it is impossible to infer therefrom that the legislature intended to impose a new liability, and make one owner responsible for the default of another owner.

The remaining question is whether the privilege of limited liability which is given in this statute to "owners" is given to equitable as well as to registered owners. Looking to the fact that but for the statute an equitable owner or part-owner might be liable to the full extent of all damage occasioned by the improper navigation of the ship; and considering the obvious intention of the legislature to be to relieve ship-owners from such unlimited responsibility, I am of opinion that the word "owners" here is not confined to registered owners, but applies to what is called equitable owners, that is, owners who are not registered. All the reasons upon which limited liability is founded apply equally to unregistered as to registered owners: and I see nothing in the Act to prevent me giving that construction to the section. Mr. Cary senior therefore, as well as the other plaintiffs, is entitled to the benefit of the statute.

(a) 2 B. & Ald. 10.

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I pronounce for the prayer contained in the petition, together with the costs of opposing it.

The minute recorded was as follows :—

“The Judge pronounced, That the owners of the vessel Spirit of the Ocean are entitled to limited liability according to the provisions of the Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862, and that in respect of loss or damage to ships, goods, merchandise, or other things, caused by reason of the improper navigation of the said vessel Spirit of the Ocean on the occasion of the collision between the said vessel Spirit of the Ocean and the vessel Robin Hood, on the 22nd day of November, 1864, the owners of the said vessel Spirit of the Ocean are answerable in damages to the amount of £4,624, and no more; being at the rate of £8 per ton for each ton of the registered tonnage of the said vessel Spirit of the Ocean.

“And *ordered* that upon payment into Court of the said sum of £4,624 with interest thereon at the rate £4 per cent. per annum until such payment into Court, and upon payment of the costs incurred in Cause No. 2453 on behalf of the plaintiffs therein, all further proceedings in said cause be stayed.

“The Judge further ordered that three advertisements should be inserted at an interval of not less than a week between each advertisement in each of the following papers, viz., the *Times*, the *Shipping and Mercantile Gazette*, and a Liverpool daily paper of large circulation, intimating to all persons having any claim in respect of the loss or damage caused as aforesaid, that if they do not come in and enter their claims in this cause on or before the 31st day of May next ensuing, they will be excluded from sharing in the aforesaid amount; the last of such advertisements to be inserted on or before the 15th day of the said month of May. And he referred all claims brought in or to be brought in to the Registrar, assisted by merchants, to report the amount thereof. The Judge further condemned the defendants in the costs occasioned by their opposition to the prayer of the plaintiffs, but condemned the plaintiffs in all other costs of the cause.”

The time for filing claims was afterwards extended from time to time to the 14th December, 1865.

The total loss proved before the Registrar by the various claimants amounted to £38,891 : 2s. 3d. The Registrar reported the proportionate amounts respectively due to each claimant, adding “With interest thereon at four per cent. per annum from the 22nd November, 1864, until paid.”

The Judge eventually decreed a monition against the plaintiffs for payment of some of the principal claims with interest as reported by the Registrar, and taxed costs.

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Clarkson, Son & Cooper, proctors for the owners of the Spirit of the Ocean.

Pritchard & Sons, proctors for the owners of the Robin Hood.

—◆—

In the Privy Council.

Present—LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

THE FUSILIER.

Life-salvage—Liability of Cargo—17 & 18 Vict. c. 104, ss. 458, 459—"Persons belonging to such Ship"—Passengers—Measure of Salvage—Apportionment of Salvage.

The owners of the cargo of a vessel to which salvage services have been rendered are liable under the 458th section of "The Merchant Shipping Act, 1854," to contribute to that portion of the claim of the salvors which arises from the saving of the lives of persons belonging to the ship.

The words "persons belonging to such ship" in the 458th section include passengers.

The value of the salvors' property endangered in the service does not limit their salvage remuneration to that sum.

ON the 29th of November, 1863, the Fusilier, a British ship of 1088 tons, left London with a cargo of general merchandise and ninety-five passengers; bound to Port Philip in the colony of Victoria. On the 3rd of December, about 5.30 P.M., in a violent tempest the ship drove on the Girdler Sand off Margate, struck heavily fore and aft and fell over on her bilge in the sand. She was undoubtedly in great danger, and continual signals of distress were made all night. The signals were observed from the light ships in the Princes' Channel, and were by them repeated to Margate, whence information was taken to the harbour-master at Ramsgate.

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Under the harbour-master's directions the lifeboat Northumberland was towed out by the steam-tug Aid to render assist-

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ance. The lifeboat was manned by a volunteer crew of twelve hands, and the steam-tug was manned by seven hands. They proceeded round the North Foreland into the Princes' Channel, and after some time found the Fusilier aground. The lifeboat was then dispatched to her assistance, and in three trips succeeded in taking all the passengers, including many women and children, from the ship to the tug. This was effected by about 7 A.M. With these passengers on board the tug then proceeded towards Ramsgate, taking also an order from the master of the Fusilier for an anchor and chain. The lifeboat returned to the Fusilier, but was shortly summoned by signals from the tug to assist in rescuing the crew of another vessel called the Demerara. The lifeboat then left the Fusilier and did not return again. The steam-tug Aid with the lifeboat in tow arrived in Ramsgate about noon on the 4th December.

The anchor and chain which had been ordered were got on board two luggers, the Champion and Lotus, of about 500*l.* and 200*l.* value respectively; they carried between them fifteen hands, among whom were the crew who had previously manned the lifeboat.

They left Ramsgate about 6 P.M. on the 4th December, in tow of the Aid, and about midnight anchored off the Fusilier. On the following morning the Aid, with two other tugs employed by the ship, endeavoured unsuccessfully to tow the Fusilier off the sand. The Aid, after offering her services in taking out the cargo, which were refused, returned finally to Ramsgate.

On the same day (the 5th of December) the luggers were ordered by the pilot of the Fusilier to proceed to the Nore and to wait there until the weather was finer. They arrived at the Nore on the evening of the 6th of December and remained there till the 10th. On that day they returned to the Fusilier, but were ordered back again to the Nore. The Fusilier was got off the sand on the 11th and was towed up to Blackwall, where the luggers followed her. After discharging the anchor and chain at Blackwall, the luggers returned to Ramsgate, arriving there on the 14th of December.

The value of the ship was 2,500*l.*, of the freight 2,581*l.*, and of the cargo 52,000*l.*, the value of the ship being taken when she came off the sands, and the freight being the gross freight to be earned on the intended voyage.

On the 20th of January, 1864, a cause of salvage was instituted in the High Court of Admiralty on behalf of the masters and crews of the steam-tug Aid and the lifeboat Northumberland, and also on behalf of the owners, masters and crews of the luggers Champion and Lotus against the vessel Fusilier, her

cargo and freight. James Baines & Co. of Liverpool, the owners of the *Fusilier*, and Bligh and others the owners of the cargo, instituted separate appearances.

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On the 22nd January, a cause of salvage was instituted on behalf of the owners of the steam-tug *Aid* and of the lifeboat *Northumberland* against the vessel *Fusilier*, her cargo and freight. James Baines & Co., of Liverpool, the owners of the *Fusilier*, and Bligh and others the owners of the cargo, instituted separate appearances.

On the 2nd February the two causes were consolidated.

The cause was heard before DR. LUSHINGTON on the 8th of June. There was no dispute as to the facts of the case, but it was argued on behalf of both sets of defendants, that neither the ship, freight or cargo, nor the owners thereof, were liable in law to pay compensation for the saving the lives of the passengers. Considerations respecting the amount of salvage due to the plaintiffs for their services (whatsoever) were also submitted by the counsel for the defendants.

The 458th and 459th sections of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are as follows:—

Sect. 458. “ In the following cases, (that is to say,)

Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person,

- (1) In assisting such ship or boat;
- (2) In saving the lives of the persons belonging to such ship or boat;
- (3) In saving the cargo or apparel of such ship or boat or any portion thereof;

And whenever any wreck is saved by any person other than a Receiver within the United Kingdom;

There shall be payable by the owners of such ship or boat, cargo, apparel or wreck, to the person by whom such services or any of them are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned.”

Sect. 459. “ Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship or

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boat as aforesaid shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives."

Judgment.

On the 14th of June, DR. LUSHINGTON delivered judgment.

In this case important services have been rendered by the salvors. Those services consisted partly in saving the ship and cargo, but chiefly in saving the lives of ninety-five passengers. And the chief question is, whether in any shape the cargo is liable to contribute to this life salvage.

I will begin by stating what was the law of the Court respecting life salvage before any statute was passed on the subject of salvage. Where no property had been saved, and life alone had been preserved from destruction, no suit for salvage reward could be maintained. One reason for this state of the law was, that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. In some cases it happened that one set of persons exclusively saved life, and another wholly distinct set saved the ship and cargo; but in this case also the salvors of life could not render the property amenable to their claims. But where life and property had been saved by one set of salvors, it was the practice of the Court to give a larger amount of salvage than if the property only had been saved; and this doctrine rests on high authority. The practice, too, was that all the property saved should be liable to pay such increased rate of salvage, the ship, the freight, and the cargo, each in proportion to its value.

Such being the state of the law and practice of the Court,—what was the grievance which required the interposition of the legislature? That grievance clearly was, that persons who at the risk of their own lives, perhaps, had saved life only, or with very little property, could not be justly compensated. The leading motive, then, for a legislative enactment was to encourage the saving of life by providing a reward for it; but there was a subsidiary ground—the encouragement of salvors generally, for such reward operates as a further incentive to salvage exer-

tions. This being so, it would be reasonable to suppose that the remedy given by the legislature would supply what was wanting in the old law, but would make no other change. This brings me to the consideration of the 458th section of the Merchant Shipping Act, upon which the question now depends.

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That section begins by defining what constitutes a salvage service; it states three special heads—salvage services to ship, life salvage, and salvage services to cargo, which, when occurring separately, or in any combination, are to be salvage services. The section then goes on to declare, that payment shall be made by the owner of the ship or cargo of a reasonable amount of salvage. If the statute ended here, I should say that the effect of it was simply to constitute the saving of life to be *per se* a salvage service, and to leave the mode of payment to be according to former practice; for I cannot find any words in this section adequate to effect so serious a change in the law as to introduce a new system of payment, in substitution of the ancient rule which, where life was saved together with ship and cargo by a single set of salvors, threw upon the cargo a part of the proportionate increase of the salvage reward. The existing grievance was not the mode of payment—charging the cargo in part—but the absence, in some cases, of all payment for life salvage.

I must resume this question when I come to the consideration of the 459th section, but I think it would be most convenient first to dispose of all matters in dispute arising with respect to the 458th section. It has been said that the words “in saving the lives of the persons belonging to the ship or boat” do not include passengers. If this argument be well founded, then it follows that the saving the lives of passengers is not to be paid for at all, either by the ship, or cargo or otherwise, or, in other words, that it does not constitute a salvage service; and that the legislature, in defining what constitutes a salvage service, has omitted it. Consider this in two ways: first, by simply referring to the words of the section; secondly, by looking to the reasons for inclusion or exclusion. If the master and crew alone were meant, why did not the legislature express their intention in plain terms? Nothing could have been more easy than to have said “master and crew,” but these are not the words used. Then, as to the words “belonging to such ship”—“belonging” is certainly a word of *incipit usus* with reference to the subject-matter; but one of the rules of construing statutes, and a wise rule too, is, that they shall be construed *loquitur ut vulgus*, that is, according to the common understanding and acceptation of the terms; and I think that nothing is more common than to

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say of passengers by a ship, that they are persons belonging to the ship. Upon these grounds alone I should hold that "persons belonging to the ship" included passengers. But looking to the reason of the thing, the lives of passengers are surely as valuable as those of the master and crew ; and it would be somewhat strange that the legislature, in providing for salvage for saving life, should exclude this class of persons. The object of the legislature must be, surely, to save all, and not only a particular designation of persons. The more extensive also the construction, the greater is the reward, and the greater the encouragement to encounter difficulty and danger. A contrary construction would be, in effect, to say to the salvors, "Never mind the passengers ;" in other words, an inducement to abandon life and to save property instead, and this in direct opposition to all moral obligations, which I must consider, and am by law bound to consider, as the foundation of all legislation. I have no doubt, therefore, that passengers are included in this section.

I now come to consider the 459th section. I do not hesitate to say, that I have experienced doubt and difficulty in my endeavours to ascertain the true meaning of this section. The word "cargo" is not to be found in it. It is by inference only that the law relating to the payment of life salvage by the cargo can be affected. That law must remain as it was, unless I can fairly arrive at the conclusion that the legislature has intended to alter it, and has done so. This section requires that the owner of the ship shall pay salvage for life in priority to all other claims ; and, in case the ship is destroyed, or is of too small a value, the Board of Trade may pay what is needful from the Mercantile Marine Fund. This enactment proves the anxiety of the legislature that salvage for saving life shall always be paid, but leaves a doubt whether it was intended to alter the old law, or only to supply what was wanting under the old law ; whether it was intended to throw the whole burden in all cases on the ship, or only to give priority of payment when the ship was the only fund to which recourse could be had. The construction that cargo should not contribute to life salvage would, as I have said, work a great change in the law, and go much beyond the grievance which existed—the want of reward for life salvage alone. It has been said, what interest have the owners of the cargo in the saving of the lives of the master and crew, or the lives of the passengers ? why should they be taxed for the saving of life ? is it not sufficient for them to pay for the salvage of their own property ? This may appear to be a strong argument ; but is the payment of

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life salvage always founded upon the benefit reaped by the party who is called upon to pay? Both by this statute, and by the law before the statute, the owner of the ship might pay for life salvage when he reaped little or no benefit therefrom. By this statute the owner of the ship must pay to the utmost extent of the little which may be saved. The salvors of life must be paid in priority, even where the salvors of the ship are different persons, and that, too, in cases where it might be very difficult to affirm that the owner of the ship was benefited by the saving the lives of the master and crew, or the passengers. The ground, therefore, for charging the ship with the payment of salvage for life is not the actual benefit received by the shipowner in the particular case. The same reasoning applies to the cargo. It is true that when the master and crew are taken from the ship because of imminent danger, and the ship left without men to man her, such a proceeding cannot be held to be a direct benefit to the cargo, though, in some very exceptional cases, the removal of the passengers may be an advantage incidentally. But direct benefit is not the sole principle upon which salvage reward is required to be paid. I am of opinion that the payment of salvage depends upon more general principles; and, in saying this, I think I am supported both by Lord Stowell and Mr. Justice Story. Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and marine commerce. All owners of ships and cargoes and all underwriters are interested in the great principle of adequate remuneration being paid for salvage services; and none are more interested than the underwriters of the cargo. For these reasons I shall decree the salvage payable to be borne by the ship, freight and cargo, as heretofore accustomed in similar cases.

[The learned Judge then reviewed the facts of the case, and awarded 700*l.* to the *Aid*, 700*l.* to the lifeboat, and 800*l.* to the two luggers.]

From this decree the owners of the cargo appealed, the respondents being the owners, masters and crews of the steam-tug *Aid*, of the lifeboat *Northumberland*, and of the luggers *Champion* and *Lotus*, and the owners of the ship *Fusilier* intervening. The owners of the *Fusilier* were content to abide by the decree, inasmuch as if the cargo contributed according to its value, the proportion of the sum of 2,200*l.* decreed which would fall upon the ship and freight would be about 220*l.* But as the owners

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of the cargo appealed, and as the result of that appeal might be to leave the entire sum of 2,200*l.* to be satisfied out of the ship and freight, the owners of the ship were compelled to intervene.

The Queen's Advocate (Sir *R. Phillimore*, Q. C.) and *Potter*, for the appellants, the owners of the cargo.—The principal question is whether cargo is liable under the 458th section of the Merchant Shipping Act for life salvage, that is to say, whether the owners of cargo which is laden on board any particular ship are liable to pay salvors for saving the lives of persons belonging to that ship. Apart from the statute there is properly no liability to life salvage at all; and there is no clear reason why cargo should pay for services from which it receives no benefit. The language of the 458th section is ambiguous; but it is to be interpreted by the 459th section, which shows that the ship and the ship only is to be liable for life salvage.

Secondly. Passengers, we submit, are not “persons belonging to the ship.” This appears from the rule that in certain circumstances they may earn salvage reward for rendering services to the ship: *Vrede* (a); *Towle v. The Great Eastern* (b).

Thirdly. The amount awarded to the luggers was, we submit, excessive.

Manisty, Q. C., and *Lushington*, for the owners of the Fusilier.—The whole of the property saved, cargo as well as ship, ought to pay the life salvage. There is no reason why the cargo should not contribute as well as the ship. This, it is submitted, is the reasonable meaning of the words of the 458th section; and that interpretation is confirmed by the provisions in the earlier statute 9 & 10 Vict. c. 99, ss. 19, 20, now repealed.

The 459th section, which refers to the ship only, was probably framed per incuriam.

Deane, Q. C., and *Clarkson*, for the salvors.—We submit that the amount awarded was fully justified by the circumstances, and that the learned Judge in the Court below was right in making the cargo contribute to the life salvage. The intention of the legislature in the 458th section is clearly shown by the 468th and 469th sections, which make the cargo liable for life salvage whilst the property is in the hands of the Receiver of wreck. No real distinction for purposes of life salvage can be made between passengers and other persons.

(a) *Lushington*, 329.(b) 11 *Law Times*, N. S. 516.

On the 8th of March, LORD CHELMSFORD delivered the judgment of the Committee.

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The principal question raised upon this appeal is, whether by the 458th and 459th sections of the Merchant Shipping Act, 1854, the owners of the cargo of a vessel to which salvage services have been rendered, are liable to contribute to that portion of the claim of the salvors which arises from the saving the lives of the passengers on board the vessel. There was another subordinate question as to the amount of salvage awarded to some of the salvors, which will require a short notice.

The principal question is—
Is cargo liable to contribute to the salvage of passengers' lives?

The facts of the case were all agreed to on both sides. The appellants, the owners of the cargo on board the Fusilier, the vessel salvaged, admitted that the owners, masters and crews of the different vessels to whom salvage was awarded were entitled to remuneration for their services. The value of the ship was 2,500*l.*, of the freight 2,581*l.* 17*s.* 8*d.*, and of the cargo 52,000*l.* The learned Judge of the Court of Admiralty pronounced "the sum of 2,200*l.* to be due to the salvors for the salvage services rendered by them to the vessel Fusilier and her cargo, and for their services in saving the lives of the passengers on board the said vessel, namely, to the master, owners and crew of the steam-tug Aid the sum of 700*l.*; to the master, owners and crew of the life boat Northumberland the sum of 700*l.*; and to the masters, owners and crews of the luggers Champion and Lotus the sum of 800*l.*, together with costs." The services rendered by the luggers were these:—On the 3rd of December, 1863, the Fusilier was aground on the Girdler Sand. The steam-tug Aid and the life boat Northumberland had been rendering assistance, and had succeeded in taking all the passengers out of the Fusilier and placing them in safety on board the Aid, to be conveyed to Ramsgate. The Aid received an order from the Fusilier to bring an anchor and chain from Ramsgate, to be used in getting her off the sand. The weight of the anchor and chain procured for this purpose was found to be too great for the Aid, and it was necessary to employ the two luggers, the Champion and the Lotus, to carry them off to the Fusilier. These vessels anchored near the Fusilier at midnight of the 4th of December, and remained by her the whole night. On the following day, unsuccessful attempts were made to tow the Fusilier off the sand. In the course of the afternoon of the 5th of December, the gale, which had been blowing from the westward, changed to the southward, thereby lessening the chance of the Fusilier being got off the sand, and the luggers were ordered to proceed to the Nore, and remain there till the weather moderated. They remained at the Nore from the 6th to the 10th of December;

The nature of the services rendered.

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then, according to instructions, they returned to the Fusilier. which not being sufficiently light to float, although part of her cargo had been removed, they were ordered back to the Nore, still with the anchor and chain on board; and the Fusilier having been got off the sand on the 11th of December, they followed her to the Blackwall Docks, and finally arrived at Ramsgate on the 14th of December. The Appellants objected that the amount of 800*l.*, awarded to the Champion and the Lotus for their services, was excessive, and urged as proof of the excess, that it exceeded the value of the two vessels.

The Court of Appeal is extremely reluctant to disturb a salvage award on the question of amount.

Their Lordships would always be slow to disturb an award of salvage by the learned Judge of the Court of Admiralty on the ground of his having given too large a sum to the salvors, unless they were satisfied beyond all doubt that he had made an exorbitant estimate of their services. The accident of the amount of salvage exceeding the value of the vessels is wholly immaterial. Undoubtedly the placing valuable property in peril may enhance the merit of salvage services, but it does not follow, on the contrary, that the trifling character of the property endangered will necessarily detract from the value of such services. It was not quite correctly said in argument at the bar that what is risked is the first thing to be regarded, and the next the services which are rendered. It would have been more accurate to have reversed the order of these considerations, and to have said that the first thing to be regarded is the value of the services with reference to the amount of property rescued from peril, and the next, how far the merit of these services is enhanced by the risk to life or property which has been involved in them. Taking the grounds of claim to salvage in this order, it is obvious that it never can be an argument against the amount awarded to the salvors, that it exceeds the value of their property put in peril by the service. And even if such an argument could ever be urged, it hardly belongs to the appellants in this case. No complaint was made by them of the total amount of salvage awarded to the salvors in one entire sum of 2,200*l.* It is only in the distribution of this sum amongst the different classes of salvors that there is any opening for their objection. Now the award of salvage is not of such a sum to one set of salvors, and such a sum to another, making a total of 2,200*l.*, but of that sum as the whole value of the salvage services which is afterwards apportioned amongst them, according to their respective merits. The amount allotted to the Champion and the Lotus might be made the subject of dispute by the owners and crew of the other vessels, but it can hardly be objected to by the appellants, who have never once suggested that, taking into account the value of

the property rescued from peril, and the number of lives saved, the sum of 2,200*l.* was too great a reward for the whole of the services rendered. There is, therefore, no valid objection to the decree upon this ground.

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The principal question in the case is one of great importance, and of some difficulty. Prior to the passing of "The Merchant Shipping Act, 1854," the Court of Admiralty, in a cause of salvage where no property had been rescued from peril, but where life had been saved, had no power to award anything to the salvors. But where both property and life had been saved, it was the well-established practice of the Court to increase the amount of salvage, and thus indirectly remunerate the salvors for the merit due to their having saved life as well as property. Of course, as the salvage was awarded in one entire sum, the owners of the cargo, as well as of the ship and freight, contributed their proportion to the payment of this increased salvage, and so in a certain sense were rendered liable to the payment of what is called life salvage.

Before "The Merchant Act, 1854," the Court of Admiralty indirectly gave reward for life salvage, by allowing a higher rate of salvage against the property, ship and cargo.

Before the passing of "The Merchant Shipping Act, 1854," the legislature had provided for the payment of a reward or compensation by way of salvage for the saving of the life of any person on board a ship or vessel in distress, by the 19th and 21st sections of 9 & 10 Vict. c. 99, "An Act for consolidating and amending the laws relating to Wreck and Salvage." The provisions of these sections are substantially re-enacted in "The Merchant Shipping Act, 1854," and therefore need not be further noticed.

In construing the 458th and 459th sections of the Act on which the principal question arises, the recognized practice of the Court of Admiralty of indirectly rewarding salvors for the saving of human life by giving an increased rate of salvage on that account must always be borne in mind. The legislature in dealing with the subject of life salvage must be taken to have been aware of this practice, and to have intended to confer upon the Court of Admiralty a power of doing that directly which they had been so long in the habit of doing indirectly. And it must also be remembered that by the established practice of the Court the owners of cargo were always rendered virtually contributory to the reward and compensation given to salvors for the preservation of life. Under these circumstances the provisions in the sections in question were introduced. The 458th section is in these terms :

The provisions of that Act, sects. 458, 459, 468, 469, to be read by the light of the former practice.

"Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the

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 March 8. person,—

- “ 1. In assisting such ship or boat ;
- “ 2. In saving the lives of the persons belonging to such ship or boat ;
- “ 3. In saving the cargo or apparel of such ship or boat, or any portion thereof ;
- “ And whenever any wreck is saved by any person other than a Receiver within the United Kingdom ;

“ There shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage, together with all expenses properly incurred by him in the performance of such services or the saving of such wreck, the amount of such salvage and expenses (which expenses are hereinafter included under the term salvage) to be determined in case of dispute in manner hereinafter mentioned.”

The term “persons belonging to such ship” includes passengers.

It is perhaps hardly necessary to advert to a point which was raised in the Court of Admiralty, but barely mentioned here, and certainly not insisted upon, that the persons saved being passengers on board the Fusilier, were not in the terms of the Act, “persons belonging to such ship.” It would be strange indeed if an Act intended to encourage and reward the saving of life which is in peril in consequence of the distress and danger of the vessel in which it is embarked, should be construed so as to make a distinction between those who were on board in different capacities and different relations to the vessel. It is a sufficient answer to such an objection to say that nothing is more common in popular language than to speak of “the passengers belonging to such a vessel.” The salvors therefore are entitled to a reasonable amount of salvage for the services rendered in saving the lives of the passengers on board the Fusilier, and the only question to be considered is whether the owners of cargo are liable to contribute towards its payment.

The true construction of the Act is, that cargo as well as ship must contribute to the life salvage.

The general rule as to the parties liable to pay salvage is, that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress would be of any benefit, either to the vessel or to the cargo. The legislature therefore could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have

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been contemplated is, that there should be included in the entire sum payable for salvage of ship and cargo, a distinct reward for the preservation of human life. It was argued on behalf of the appellants that when the 458th section, after describing the services to be rendered in assisting the ship or boat, in saving the lives of the persons belonging to the ship or boat, and in saving the cargo or apparel of the ship or boat, goes on to say, "there shall be payable by the owners of such ship or boat, cargo, apparel or wreck," a reasonable amount of salvage, the words must be read *reddendo singula singulis*. But, although this might very well be if the section had confined the claim to salvage to the saving of the ship and cargo and apparel, for then each species of property benefited would alone have been chargeable, yet, where amongst the other subjects of claim, the saving of human life is included, there is no reason why that should be referred to the ship any more than to the cargo, since the one derives no more benefit than the other from the services rendered. The legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach, without any distinction, upon all the owners of property exposed to the common danger. And as the salvage is always awarded in a gross sum, and under this section is to be increased by the reward for the saving of life, the owners of cargo since the Act are liable exactly to the same extent as before, with this immaterial difference, that there now is a distinct and express item of claim to increase the amount of salvage to which they are contributory, instead of the whole being estimated upon a higher scale. But it is said that the 459th section of the Act shows that it must have been intended by the legislature that the owners of the ship should alone be liable to the payment of life salvage, for it enacts that "salvage in respect to the preservation of the life or lives of any person belonging to any such ship or boat shall be payable by the owners of the ship or boat in priority to all other claims for salvage, and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit, in whole or part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." There is no doubt that this section creates some difficulty as to whether the legislature

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intended that life salvage should be payable by any other persons than the owners of the ship, but if such was the intention it would have been easy to have expressed it, and the language of the section is capable of the construction that it merely fixes the limit of the shipowner's liability, and does not mean to render him solely liable to the payment of this description of salvage. And whatever doubt may be thrown upon the subject by this section, there are two subsequent sections of the Act, the 468th and the 469th, which appear to be susceptible of no other interpretation than that the owners of cargo were intended to bear a proportion of the payment for life salvage. The 468th section enacts, "that whenever any salvage is due to any person under this Act, the Receiver shall act as follows (that is to say): If the same is due in respect of services rendered in assisting any ship or boat, or in saving the lives of persons belonging to the same, or the cargo or apparel thereof, he shall detain such ship or boat, *and the cargo* and apparel belonging thereto, until payment is made, or process has been issued by some competent Court for the detention of such ship, boat, cargo, or apparel." It is thus expressly provided, that in the case of salvage being due for services rendered in saving the lives of persons belonging to the ship, the cargo shall be detained. And it is not intended that it shall be merely held as additional security with the ship for payment of the salvage, for the 469th section enacts, that "whenever any ship, boat, cargo, apparel or wreck so detained by any Receiver for non-payment of any sums so due as aforesaid (that is, amongst others, for services rendered 'in saving the lives of persons belonging to the ship'); the Receiver in certain cases may sell such ship, boat, cargo, apparel or wreck, and out of the proceeds of the sale defray all sums of money due in respect of salvage." Whatever difficulty, therefore, may be supposed to be created by the 459th section, it seems impossible to read the two last-mentioned sections without being satisfied that they proceed upon the ground of the owners of cargo being liable to the payment of life salvage. The object of the legislature in the different sections referred to seems to have been to give a legislative sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life, by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of property involved in the common peril, more than on another. Their Lordships after much consideration have arrived at the same conclusion with the learned Judge of the Court of Admiralty, and they will, there-

fore, humbly recommend to her Majesty that the decree appealed from be affirmed, and that the appeal be dismissed with costs.

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Decree
affirmed, with
costs.

Waltons & Bubb, solicitors for the appellants.

Rothery, proctor for the respondents.

Marshall, solicitor for the owners of the Fusilier.

THE NONPAREIL.

Seaman's Contract—Meaning of the word "Dollar."

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If there be a doubt as to the interpretation of a seaman's contract, the contract is to be interpreted favourably to the seaman.

A seaman signed articles at New York to serve on board a British ship on a voyage to terminate either in the United States or in the United Kingdom, "amount of wages per month" to be "50 dollars." At the time of making this contract there was an inconvertible paper-dollar currency in the United States, and the actual exchange value of the paper dollar in English currency was then 2s. 8½d. It afterwards depreciated in value. The voyage terminated at Liverpool in the United Kingdom, and the seaman was there discharged.

Upon evidence that for 25 years past seamen discharged from American ships in London or Liverpool received their wages at the rate of 4s. 2d. a dollar:

Held, that the parties contracted subject to this usage, and that the seaman was entitled to have the dollar reckoned at the value of 4s. 2d.

THIS was an action by Walter Mac Farland, chief mate of the British ship Nonpareil, for wages.

On the 7th May, 1863, the plaintiff signed articles at New York to serve as chief mate of the Nonpareil for a voyage from New York to Shanghai, thence to one or more ports in China, and back to a final port of discharge either in the United States or in the United Kingdom: the voyage not to exceed two years.

In the schedule annexed to the articles, the column headed "Amount of wages per month" was filled in thus, "£50 00/;" and the column headed "Amount of wages advanced on entry" was filled in, "£75 00/."

On the back of the articles was the following indorsement:—

"British Consulate,

New York, May 9, 1863.

"I hereby certify that I have sanctioned the engagement of Walter Mac Farland and twenty-seven others upon the terms

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mentioned in the within agreement. The system of shipping crews at this port does not allow of the above men appearing before me to sign or acknowledge the said agreement, but I have inquired and am satisfied that they fully understand the same.

(L.S.)

Pierrepoint Shoards,
V. Consul."

The plaintiff sailed in the ship to Shanghai, and thence to Liverpool, where the ship arrived on the 16th March, 1864, and the cargo was shortly afterwards discharged. The plaintiff on joining the ship had received seventy-five American paper dollars, commonly called greenbacks. At Shanghai he had received \$105 : 50 cents. in Mexican silver. On the plaintiff being discharged at Liverpool, a dispute arose as to the amount at which the dollar should be reckoned in computing his wages. In the account which the master delivered to the plaintiff under the 171st section of the Merchant Shipping Act, 1854, he reckoned the dollar at 2s. 8½d., which in consequence of the inconvertible paper-dollar currency in the United States was the rate of actual exchange of the dollar at the date when the articles were signed; the plaintiff, on the other hand, claimed that the dollar should be reckoned at 4s. 2d.

The plaintiff now brought his action. In the schedule annexed to his petition he put his gross wages at 112l. 5s. 11d., reckoning 4s. 2d. to the dollar, from which he allowed as deductions the seventy-five dollars advanced at New York, reckoning each of such dollars at 4s. 2d.; and the 103 dollars advanced at Shanghai, reckoning each of such dollars at 5s. 9d. His net wages, including ten days double pay, thus amounted to 74l.

The defendant paid into Court the sum of 47l. 17s. 1d. This sum was arrived at by reckoning the dollar at 2s. 8½d., both as to the stipulated wages and the advances in New York and Shanghai.

At the hearing of the cause, it was admitted on the part of the plaintiff that the actual exchange value of the American dollar at the date of the signature of the articles was that stated by the defendant, and that such value was further depreciated at the date of the plaintiff's discharge. Also, that in the United States the paper dollar was a legal tender. On the other hand evidence was given by an American ship agent at Liverpool, and also by the American Vice-Consul in London, that during the last twenty-five years seamen paid off from American ships in this country had always been paid off at 4s. 2d. the dollar.

Brett, Q. C. (Lushington with him), for the plaintiff.—The real question is, at what value shall the dollar be reckoned, when the seaman is paid off in this country. If there is any doubt upon the contract, the decision should be in favour of the seaman. The contract was not that the plaintiff should be paid in greenbacks or that the dollar should be less than 4*s.* 2*d.* The utmost that the defendant can say is, that if the plaintiff were paid off in New York, a tender of his wages in paper currency would be a legal tender. Looking to the custom, the contract was, that if the plaintiff were paid off in this country, the dollar should be taken to be 4*s.* 2*d.*

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Milward (Clarkson with him) for the defendant.—This is a case where the *lex loci contractus* applies: Wheaton's International Law, page 179. The paper dollar was by law inconvertible. There was, therefore, no other dollar than the paper dollar. The contract being made in the United States, the word dollar should have the meaning the word bore then and there; and the value of the dollar in the contract should be taken to be its value at that time and place: Story, Conflict of Laws, 5th ed., sections 308, 309. On that basis the plaintiff accepted seventy-five paper dollars on joining the ship. That construction of the contract would give the plaintiff a certain rate of wages wherever the voyage terminated; but if the plaintiff's construction be true, he would receive one sum as wages if he were paid off here, and another sum if paid off in the United States. The alleged custom ought to have no weight, for the American greenbacks were not issued until 1862, so that the custom extends over a period of two years only.

DR. LUSHINGTON.—There is some difficulty in this case, but I have come to the conclusion that the plaintiff is entitled to the judgment of the Court. Judgment.

There is a well known principle, which has been acted on in many cases in this Court, that if a doubt arises upon the construction of a mariner's contract, the mariner is entitled to the benefit of the doubt.

In this case the contract was entered into at New York, the voyage was to terminate either in the United States or in the United Kingdom, at the shipowner's option; the rate of wages agreed upon was fifty dollars a month. The voyage has terminated here in Liverpool, and the question is, at what rate shall the dollar be taken? at 4*s.* 2*d.*, which I may call its regular commercial value, or at 2*s.* 8½*d.*, the actual exchange value of

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the American paper dollar at the time when the contract was made.

Mr. Milward has argued that this question must be determined by the law of the United States, as the *lex loci contractus*, which law, as he says, has made this piece of green paper a dollar. It is so, no doubt, in the United States for the purpose of making a lawful tender in that country, but for that purpose only. The argument, therefore, can only amount to this, that at the time when the contract was made at New York a paper dollar there was worth to exchange against English money, 2s. 8 $\frac{1}{4}$ d. and no more; and that if the seaman had been paid off in New York, he might have been paid off in paper dollars, none of which would have been worth more than that sum. Thus much may be true, but it is not only consistent with this that during the voyage there might be a return to cash payment, or that the exchange value in English coin of the paper currency might rise; but the argument leaves out of sight altogether the fact that the articles gave the alternative that the seaman might be discharged, not in the United States but in this country, and that he has been discharged here, and that he is to be paid here. This is a most important fact; and I think that it compels me, in order to arrive at the true meaning of the contract, to look not so much to the law of the place where the contract was entered into, as to the law and custom of the place where the payment is to be made.

Now we have had clear testimony that for a long time past all seamen belonging to American ships who have been discharged in this country have received their wages at the rate of 4s. 2d. a dollar. This is deposed to have been the practice both in Liverpool and in London; and there is no evidence of any instance to the contrary since the establishment of the paper currency. This custom must have been well known in New York; and if it had been intended to vary the rate of payment in this case, the shipowner's agent there should have inserted specific words for the purpose.

I consider it proved that the customary rate of reckoning the dollar in paying seamen who have been engaged in the United States and are discharged in this country is 4s. 2d., and I hold that the parties in this case must be deemed to have contracted according to that usage. I therefore pronounce for the plaintiff's claim.

Nethersole and Speechly, solicitors to the plaintiff.

Rothery, proctor for the defendant.

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THE LLOYDS, OR SEA QUEEN.

Collision—Compulsory Pilotage—“Ship employed in the Coasting-trade of the United Kingdom”—17 & 18 Vict. c. 104, ss. 376, 379.

A vessel ordinarily occupied in the foreign trade, going from Liverpool to London in order to sail from London under advertisement for foreign parts, not carrying passengers, but having on board a cargo shipped at Liverpool and deliverable at London, is not “a ship employed in the coasting-trade of the United Kingdom,” within the meaning of the 379th section of the Merchant Shipping Act, 1854, and is compellable by the 376th section to take a pilot in the London District of the Trinity House.

THIS was a cause brought by the owners of a brig called the John Mowlem, against the steamer Lloyds, subsequently called Sea Queen, to recover damages for a collision which took place in the London district of the Trinity House. The Court found that the collision was solely occasioned by the default of the pilot of the Sea Queen; and the question then arose, whether the employment of the pilot was compulsory by law, and the owners consequently exempt from responsibility for the damages by the 388th section of the Merchant Shipping Act, 1854. It appeared that the Sea Queen, having been built at Hartlepool, brought a cargo to London; that she then went two foreign voyages; ultimately reached Liverpool; that whilst at Liverpool, she was advertized to load in London on a voyage to Matamoras; that some of the crew were hired at Liverpool to proceed to London, and thence to Matamoras; that she sailed from Liverpool with a cargo on board for London—not a full cargo, but as much as she could obtain, and with no passengers; that on arriving off Dungeness she was boarded by a duly licensed Trinity House pilot, and that subsequently, while the pilot was in charge, she met with the collision. Under these circumstances, the substantial question was whether the Sea Queen was, at the time of the collision, “a ship employed in the coasting-trade of the United Kingdom” within the meaning of the 379th section of the Merchant Shipping Act, and therefore exempt from the general obligation imposed by the 376th section on all vessels navigating the London district of the Trinity House.

The material portions of the sections of the Merchant Shipping Act (17 & 18 Vict. c. 104) referred to are as follows:—

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Sect. 376. "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House, within which the employment of pilots is compulsory, are the London district and the Trinity House outport districts, as hereinbefore defined."

Sect. 379. "The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; (that is to say)

- (1.) *Ships employed in the coasting-trade of the United Kingdom :*
- (2.) Ships of not more than sixty tons burden :
- (3.) Ships trading to Boulogne, or to any place in Europe north of Boulogne :
- (4.) Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone, being the produce of those islands :
- (5.) Ships navigating within the limits of the port to which they belong :
- (6.) Ships passing through the limits of any pilotage district on their voyages between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein."

Brett, Q.C., and *Clarkson*, for the Sea Queen, contended that the exemption in the statute referred only to vessels engaged in the coasting-trade as their accustomed trade, and could not apply to a vessel making a casual voyage from one port in England to another. The policy of the statute was to require every ship to take a pilot, unless from the usual occupation of the ship, her master might be presumed to be familiar with the navigation of the coast: Preamble to 6 Geo. IV. c. 125. The 133rd section of the last Liverpool Act (21 & 22 Vict. cap. xcii.), whilst exempting coasting vessels from compulsory pilotage, makes the exemption conditional upon the vessel having been engaged for six months in the coasting-trade. For the interpretation of the terms "employed in the coasting-trade," or "employed in foreign trade," they referred to the same or similar expressions in other Acts—52 Geo. III. c. 39, ss. 2 and 34; 7 & 8 Vict. c. 112, s. 27; 8 & 9 Vict. c. 88, s. 13; 12 & 13 Vict. c. 29, s. 2; 13 & 14 Vict. c. 93, s. 9; 14 & 15 Vict. c. 96, s. 15; and they relied on the cases of *The Agricola* (a), *Davison v. Mekibben* (b).

(a) 2 Wm. Rob. 10.

(b) 3 Brod. & Bing. 112.

Dr. *Deane*, Q.C., and *Lushington*, for the John Mowlem.—
On this particular voyage the Sea Queen was engaged in the
coasting-trade, and the particular voyage is the only admissible
criterion. The policy of the exemptions is matter for conjecture
merely. Other of the exemptions named in the 379th section,
viz., exemptions (3) and (4), apply only to a particular voyage.
So do the provisions of the 354th section ; and the definitions of
“home-trade ship,” and “foreign going ship,” in sect. 2 of the
same statute.

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DR. LUSHINGTON.—The question is, whether a vessel ordi- Judgment.
narily occupied in foreign trade, going from Liverpool to London
in order to sail from London, under advertisement for a foreign
voyage, not carrying passengers, but having on board a cargo
shipped at Liverpool, and deliverable at London, is to be held
“a ship employed in the coasting-trade of the United King-
dom,” within the meaning of the 379th section of the Merchant
Shipping Act, and as such to be exempt from the rule of compul-
sory pilotage. I have already decided in the *Agricola* (a), that a
vessel making a similar voyage without a cargo, and in ballast,
is not a ship employed in the coasting-trade. I do not see how
the fact that a vessel has a cargo on board makes any substan-
tial difference. I am of opinion, therefore, that the Sea Queen
was not “a ship employed in the coasting-trade ;” that she was
compellable to take a pilot, and that the owners cannot be
made answerable for the damages occasioned by the fault of
her pilot.

Rothery, proctor for the plaintiffs.

Cotterill & Sons, solicitors for the defendants.

(a) 2 Wm. Rob. 10.



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THE CHESHIRE WITCH.

Arrest—Wrongful Detention—Damages.

A vessel having been arrested in a cause of damage, and the suit having been dismissed with costs, the plaintiff obtained leave to detain her for twelve days, that he might have time to consider whether he would appeal. On the thirteenth day the vessel was released.

Held, that the defendant was entitled to damages for the twelve days' detention.

IN this case, the Cheshire Witch had been arrested in a cause of damage; and, as bail could not be procured, she remained under arrest from the 15th of August till the 20th of November, when the cause was heard, and judgment was given for the defendant, with costs. No notice of appeal was given; but, upon the application of the plaintiff, the Court ordered that the release should not issue for twelve days. Some correspondence took place on the eighth day, and on the thirteenth day, the plaintiff allowed the vessel to be released.

Deane, Q.C., now moved the Court to condemn the plaintiff in damages.—I admit that up to the 20th November, though the plaintiff has sustained a heavy loss, he cannot recover damages. But after that date, the vessel was detained at the request of the plaintiff's proctor. The vessel was under a time charter. I ask for the expenses of the twelve days' detention.

Clarkson, *contrà*.—The Court dismissed the plaintiff's suit. An application was immediately made not to order the release until the plaintiff had time to consider if he would appeal. No objection was made, and nothing was said about time charter. If the plaintiff had immediately appealed, as he could have done, he would have incurred no damages, unless he had acted maliciously: *The Evangelismos* (a). Here there was no malice: no improper delay.

Judgment.

DR. LUSHINGTON.—This case has operated very severely on the defendant. His ship was under arrest for some months; and then it turned out that the plaintiff had no cause of action.

(a) Swabey, 378.

The plaintiff's application for time to consider whether he would appeal was for his own convenience only.

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I shall make the order with costs: the amount of damages to be referred to the Registrar.

Jenner & Dyke, proctors for the plaintiffs.

Deacon & Son, proctors for the defendants.

In the Privy Council.

Present—LORD KINGSDOWN.

THE MASTER OF THE ROLLS.

SIR EDWARD RYAN.

THE CITY OF CARLISLE.

Collision—Lights—Position of—Admiralty Regulations, 1858.

The Admiralty Regulations of 1858, with respect to the exhibition of side lights by sailing vessels, do not require that such lights should be placed on any particular part of the ship: Such lights may be carried inboard, provided that they are fairly visible in the appointed directions.

Circumstances considered under which the regulations were sufficiently complied with.

THIS was a cause of damage brought by the owners of the brig Thomas Snook against the barque City of Carlisle, in respect of a collision which occurred between those vessels on the 30th June, 1862. The circumstances of the case are fully stated in their Lordships' judgment. The only question raised by this appeal was, whether the collision took place in consequence of the lights on board the brig not having been fixed in accordance with the Admiralty Regulations of 1858, respecting the exhibition of side lights by sea-going sailing vessels.

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The rules in question provide that—

“All sea-going sailing vessels, when under way or being towed, shall, between sunset and sunrise, exhibit a green light on the starboard side and a red light on the port side of the vessel; and such lights shall be so constructed as to be visible

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on a dark night with a clear atmosphere, at a distance of at least two miles, and shall show an uniform and unbroken light over an arc of the horizon of ten points of the compass, from right ahead to two points abaft the beam on the starboard and on the port sides respectively.

“The coloured lights shall be fixed wherever it is practicable so to exhibit them, and shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent the lights being seen across the bow.”

The learned Judge of the Admiralty Court held that the lights of the *Thomas Snook* had not been so fixed as to be fairly visible; that the Admiralty regulation above set out had not been complied with; and that such noncompliance contributed to the collision; he accordingly pronounced against the damage; but as the City of Carlisle had been negligent in having an insufficient look-out, he made no order as to costs.

(The 298th section of the Merchant Shipping Act then in force prevented a decree for the moiety of the damages.)

From this decision the owners of the *Thomas Snook* appealed.

The Queen's Advocate and *Deane*, Q.C., for the appellants.

Brett, Q.C., and *Clarkson*, for the respondents.

Cur. adv. vult.

On the 23rd July, the MASTER OF THE ROLLS delivered the judgment of the Committee.

Judgment.

In this case, at about a quarter before two o'clock on the morning of the 30th of June, 1862, the brig *Thomas Snook*, the property of the appellant, was run into and sunk by the barque the *City of Carlisle*, the property of the respondents.

The evidence in the cause establishes that the Admiralty regulation lights of the brig were burning brightly. The question on the appeal is, whether the lights were fixed in a place which complied with the regulation; or, to use the words of the learned Judge of the Admiralty Court, whether they were “so fixed as to be fairly visible.” The gentlemen who assisted the Judge of the Admiralty Court were of opinion that they were not so fixed, and in consequence the Court determined that the owners of the brig could not recover, but as they were also of opinion that the *City of Carlisle* was grossly negligent and much to blame, no costs were given to the respondents.

The learned Judge of the Admiralty Court, in his judgment in the Court below, stated his understanding of the regulation to be, "not that there is any positive order that the lights shall be fixed on the actual sides of the ship itself, but that the green light shall be exhibited on the right hand, and the red light on the left hand, so as to be visible." He also stated that the substance of the regulation is, "that the lights shall be fairly visible as described: there is no order that the lights shall be fixed in any peculiar manner or in any particular part of the ship." "And the whole question is, whether, taking the description of the manner in which these lights in the present case were fixed, they were so fixed as to be fairly visible." With these observations their Lordships concur entirely. They have in consequence carefully examined the evidence for the purpose of arriving at the means of giving a correct answer to the question so put.

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The regulation does not require that the side lights shall be carried on the actual side of the ship in any particular place; but that they shall be so carried as to be fairly visible in the appointed direction.

There is no dispute about the place where the lights were fixed. There was on the deck of the brig, just behind the foremast and nearly touching it, a galley, the length of which was about six or seven feet; it was about six feet high, and about seven feet broad. The lights were placed on the top of this galley about six inches from the outer edge of it, and about three feet behind the foremast. At the time when the collision took place, the brig was close-hauled on the starboard tack heading south-south-west, and proceeding at the rate of five and a-half knots an hour, with the wind in the west blowing a fresh breeze.

Facts of the case.

The City of Carlisle was close-hauled on the port tack heading about north-north-west, and making about five and a-half knots an hour. The vessels were therefore approaching at the rate of eleven knots an hour. The City of Carlisle struck the brig just before the forerigging on the port side, cutting right into her, when she filled rapidly, and went down.

There is no question but that it was the duty of the City of Carlisle, which was on the port tack, to give way, and if therefore the lights of the brig were properly placed so as to be fairly visible, the collision must be attributed solely to the negligence of the barque. The objections made by the respondents to the place where the lights were placed on board the brig, resolve themselves principally into this—that they were placed *in-board*, and not on the outside of the vessel, and that by reason thereof they were not, as the respondents contend, fairly visible. The breadth of the brig at this spot is not very accurately ascertained; it was not measured. Morecombe, the carpenter, supposes it to have been about 26 feet; of the other witnesses,

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Richard Swift, the mate, supposes it to have been 18 or 20 feet, Matson supposes it to have been from 18 to 21 feet. Their Lordships are informed by the nautical gentlemen who assist them, that having regard to the size of the brig, which was 249 tons, it is probable the breadth of the brig at this spot where the lights are fixed did not exceed 20 feet. If this be so the distance from each light to the side of the vessel was about 7 feet. The lights were properly secured, so that only one light could be seen at the same time, unless by a vessel exactly ahead. The foresail was set and was just in front of these lights. The dimensions of the foresail are given by Isemonger, who made it; it was 17 feet 4 inches deep, 34 feet across the head, and 34 feet across the foot, and 19 feet 4 inches depth of leach. The foot of the foresail was about $11\frac{1}{2}$ feet or 12 feet above the deck; from the clew of the foresail to the deck was about 9 feet or $9\frac{1}{2}$ feet. The brig had two foresails, but their Lordships consider it to be proved that the foresail, the dimensions of which are given by Isemonger, was the foresail set at the time of collision. It was made to be used in going in and out of the Channel, and Isemonger saw it bent on the day before the vessel went out of dock on her last voyage. If this be correct it establishes that the sail could not have interfered materially with the lights, which were only 6 feet above the deck, while the foot of the sail was from $11\frac{1}{2}$ to 12 feet above the deck, and therefore from $5\frac{1}{2}$ to 6 feet above the lights. The only material additional circumstance to be noticed is, that the brig was lying over on the port side about three strakes from an even keel, and the height of the bulwarks above the deck were from 3 feet to four feet. In this state of circumstances, the nautical gentlemen who assist their Lordships are of opinion that the position in which the lights were placed was a fit and proper place for them, having regard to the size of the vessel. They are also of opinion, having regard to the fact that the vessel was lying over considerably on the port side, that if the lights had been fixed in the usual place, that is, on the top of the bulwarks, the red light on the port side would have been obscured by the spray, and would have been less fairly visible than on the top of the galley; and that if a proper look-out had been kept on board the barque, the red light would have been seen in sufficient time to avoid a collision.

The right conclusion is, that the brig's lights were carried in a proper place.

Their Lordships concur in the opinion expressed by the learned Judge of the Admiralty Court, that there was gross negligence on the part of the City of Carlisle. The persons on board that vessel were engaged in furling the foretop-gallant-sail, there was but one man on the look-out, and little attention seems to have

been paid to anything except what the men aloft were engaged in. The brig seems to have been seen and reported simultaneously from aloft and by the man on the look-out, but not in sufficient time to avoid the collision.

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Their Lordships, after reading the evidence and considering the matter with the nautical gentlemen who assist them, have come to the conclusion that the lights were not improperly placed, having regard to the size of the brig, that they were placed in a position in which they were fairly visible, and in fair compliance with the regulation. Their Lordships are of opinion that if a proper look-out had been kept on board the City of Carlisle the collision would have been avoided, and that that vessel was the sole cause of the collision.

Their Lordships will therefore humbly advise her Majesty that the decision of the Court of Admiralty be reversed, and that the respondents be condemned in damages and costs.

Decision reversed, with costs.

THE KARLA.

Costs of Suit—Costs of detaining foreign Seamen as Witnesses—Charge for Agency.

A party in a cause is not bound to examine any of his witnesses before the hearing; and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing.

In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed.

THIS was a motion on the part of the plaintiffs to review the registrar's taxation of the defendants' bill of costs.

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On the 28th September, 1863, the cause was instituted by the plaintiffs, the owners of the Joseph Straker, against the foreign ship Karla, to recover damages occasioned by a collision. On the 14th October, the owners of the Karla entered an appearance. There was also a cross action. One of the Karla's witnesses was, upon application, examined before the trial. Her other witnesses, four in number, being all seamen belonging to the ship, were examined at the trial, which took place on the 23rd December, 1863, resulting in judgment for the Karla.

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In taxing the defendants' costs, the Registrar had allowed to each of these four seamen who had been examined at the trial maintenance money from the 14th October, 1863, to 31st December, 1863. He also allowed the sum of 10*l.* 10*s.*, a sum paid to Mr. Wendt, as a charge for agency. These were the items objected to.

Deane, Q.C., in support of the motion.—It is submitted that if the defendants did not avail themselves of the power given by the rules of the Court, (Rules 78, 79) to have their seamen examined immediately upon the institution of the cause, they should not now charge the other side with the expense of maintaining them until the trial: Such expenses would not be allowed in the Courts of common law; the witnesses would get their ordinary expenses, and no more. There is no authority for allowing any charge for agency when the witnesses are in London.

The Queen's Advocate (Sir *R. Phillimore*), contra.—There is no obligation upon a defendant to produce his witnesses before the hearing. To compel a foreigner defendant to do so, by inflicting a pecuniary loss upon him if he does not, would expose him to an unjust disadvantage. These expenses were just and necessary; so also was the charge for agency, for here the seamen were foreigners.

Judgment.

DR. LUSHINGTON.—I am happy to say that these questions of taxation very seldom come under the consideration of the Court. I have every reason to believe that in the administration of justice by the Registrar, and in examining the accounts which are given in, and the charges, great pains and attention are paid in order that no larger sum than is right shall be imposed upon the unfortunate person who fails in the case. But it is very desirable to look at what must be the governing principle in all these cases. The governing principle must be this—that the party who has been successful in the case shall be indemnified for all losses and expenses to which he has necessarily been put by the legal proceedings, provided these are of the same nature as those allowed in the ordinary and accustomed practice of this Court in matters of this description.

The defendant is under no obligation to examine his witnesses before the hearing, and he is entitled to the

Now, with respect to the four witnesses, and the allowance made by the Registrar for their detention here, the Court has to consider whether it was just and reasonable that these persons should be kept in this country for the purpose of oral examination, or whether it was incumbent on the party to have examined

them at an earlier period in one of the ways pointed out by Dr. Deane. I am very clearly of opinion that it is in the option of the party who has witnesses to be examined, to adopt that course which appears to him most advantageous to his client. I cannot conceive that it is ever incumbent upon the owner of a vessel, who is defendant in the cause, to proceed to the examination of foreign witnesses by affidavit, or by commission or oral examination, before the petition is examined upon, or, in other words, before the witnesses for the plaintiff have been examined. He is not bound to pursue such a course. Therefore, as to the principle, the Court hesitates not to say that the necessary detention for the purpose of examining foreign witnesses is a proper charge; and there is no objection to the amount of the charge in this case.

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expenses incurred in detaining them for the trial.

It should not be supposed that as to witnesses examined in other Courts the charges for them are always small, or that the charges are merely limited to the expenses for the day; because, in my experience, shortly after I had come into the profession, the Court of Queen's Bench allowed the sum of 2,000*l.* for one witness, because in their opinion he was a most important witness for the decision of the cause. He was a Russian, and refused to remain unless he was remunerated on exorbitant conditions. I well remember that case: I do not cite it as an example to be followed, and I hope it may not occur again; but I do so for the principle that the detention of witnesses, where absolutely necessary for the purposes of justice, must be paid for by the losing party. I have no doubt on that point.

As to the second point, the only inquiry the Court can or will institute is this—were the services of Mr. Wendt absolutely necessary for the purpose of enabling the proctor to conduct the cause? With respect to foreign witnesses and interpretation, it is impossible to suppose that the proctor or solicitor is acquainted with the languages they speak, and it must be through some medium, that of an interpreter, that their evidence is obtained. It might be that they might be examined by commission through an interpreter, but that is only a course whereby it is more likely the expense would be augmented. I think that the sum of ten guineas for the services of Mr. Wendt is as moderate as can be; and, consequently, I pronounce against both the objections. The plaintiffs, of course, must pay the costs.

The witnesses being foreigners, the claim for agency allowed.

Deacon & Son, proctors for the plaintiffs.

Dyke & Stokes, proctors for the defendants.

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BRIG, NAME UNKNOWN.

*Slave Bounties—Joint Capture—1 & 2 Vict. c. 47, s. 2—
2 & 3 Vict. c. 73.*

A Queen's ship, which is authorized to capture slave ships, being in sight during the chase and capture by another ship of war of a vessel equipped for the slave trade, is entitled to share as joint captor in the tonnage bounties awarded under 1 & 2 Vict. c. 47, unless the *animus capiendi* is clearly rebutted.

In establishing a claim to joint capture of a vessel equipped for the slave trade, proof that the alleged joint captor was seen by those on board the prize before capture is important, but is not absolutely required as in cases of prize of war.

At daylight on a morning nearly calm, her Majesty's steamships Falcon and Dart were in company, each under canvas only; each had authority to capture vessels engaged in the slave trade; but the Falcon was on her voyage home. A vessel, which afterwards proved to be equipped for the slave trade, appeared in sight of both ships: the Dart got up steam and went in chase. The captain of the Falcon, deeming the Dart sufficient for the purpose, did not get up steam, but continued his course. The chase lasted a few hours only; and the capture by the Dart took place in daylight, in sight of those on deck of the Falcon, at the distance of about seven miles. The prize was destroyed as unseaworthy. Proceedings of adjudication subsequently took place, and bounties were awarded under the 2 & 3 Vict. c. 73; 1 & 2 Vict. c. 47, s. 2.

Held, that the Falcon was entitled to share as joint captor.

THIS was a motion to reject the following petition, which had been filed on behalf of the captain, officers and crew of her Majesty's steam-sloop Falcon, praying the Court to pronounce the Falcon joint captor with her Majesty's ship Dart of a brig, name and nation unknown, which was captured on the 11th July, 1862, as a vessel equipped for the slave trade.

"1. On the 10th day of July, 1862, her Majesty's steam-sloop Falcon, being under the command of Commander Heneage, and duly furnished with the necessary instructions, and authorized to seize and detain and capture vessels engaged in the slave trade, left the port of Saint Paul de Loando in company with her Majesty's steam gun-boat Dart, under the command of Commander Richards. The Falcon was bound to the Island of Ascension, on her way to England, and the Dart was bound on a cruise off the coast of Africa, for the suppression of the slave trade.

"2. At daylight of the 11th of July, both the Falcon and the

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Dart were at sea under sail, in latitude about $8^{\circ} 25$ south, and longitude $12^{\circ} 53$ east. The Dart was only about a mile and a-half south-south-west of the Falcon. The wind was about north-east, and very light. A strange sail, bearing west by compass, was then observed from the Falcon on the port-beam, about 7 or 8 miles distant; her hull was distinctly visible, and she was observed to be steering to the westward. About 7 A.M. the strange sail, which had previously been discovered to be a brig, was observed to make additional sail. About 9.30 A.M. the Dart was observed to alter her course for the said brig. About 11 A.M., the wind having then fallen to a calm, the Dart was observed from the Falcon to proceed under steam in chase of the said brig.

“3. During the same day the Falcon remained under all plain sail on a wind, making, however, little progress, owing to light winds and calms. She did not have recourse to steam.

“4. The commander of the Falcon did not cause his ship to join in active chase, because he considered the Dart to be amply sufficient for the purpose, and because he knew that if the brig kept away she must necessarily near the Falcon.

“5. About noon of the same day, the Dart bore S.W. of the Falcon. The said brig bore about south by west, distant from the Falcon about 7 miles only, and continued at about the same distance until after she had been captured by the Dart. The Dart was distinctly observed from the deck of the Falcon to come up to, and close with the said brig, for the purpose of capture, about 1.30 P.M.

“6. The said brig so captured proved to be a vessel engaged in the slave trade, and as such liable to capture.

“7. The brig remained in sight from the Falcon until dark, about 6 P.M. The Dart after so capturing the said brig proceeded in chase of another vessel, and was detained thereby until after dark, when she rejoined the brig and took her in tow, and about midnight closed with the Falcon with the said brig in tow, and thereupon the commander of the Dart came on board the Falcon, and informed her commander of the particulars of the said capture.

“8. On the following morning, the 12th of July, the master and carpenter's mate of the Falcon were sent on board the prize brig to assist in taking her measurement, and the said brig being found unseaworthy was ordered to be burnt, and was burnt accordingly on the same day.

“9. Annexed to this allegation, and marked A, is a true copy of the original log-book of the ship Falcon for the eleventh and twelfth days of July, 1862.”

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The capture having taken place under the provisions of the statute 2 & 3 Vict. c. 73, the suit had been instituted under the 6th section of that Act, which renders applicable the enactment of the 5 Geo. IV. c. 113 (viz. the 71st section), "relative to authorizing the High Court of Admiralty to determine as to doubtful claims of bounty, and also on any question of joint capture."

By the 3rd section of the 2 & 3 Vict. c. 73, the High Court of Admiralty, and all Courts of Vice-Admiralty in any colonies or dominions of her Majesty beyond the seas, are authorized to try and condemn any vessel equipped for the slave trade, which shall not establish to the satisfaction of the Court that she is justly entitled to claim the protection of the flag of any state or nation.

The 6th section appoints that there shall be applied *mutatis mutandis* to seizures of vessels under that Act (*inter alia*) the enactments set forth in the statute 1 & 2 Vict. c. 47, "relative to rewarding the captors with a bounty on the vessel as well as on the slaves."

The 1 & 2 Vict. c. 47, enacts,

Sect. 2. "Where any ship or vessel which shall have been or may be seized and condemned under the provisions of any treaty or convention made or to be made with any foreign power, or additional article to any such treaty or convention, shall have been or shall be entirely demolished, and the materials thereof publicly sold in separate parts as well as her cargo, there shall be paid to *the commanders, officers and crews of her Majesty's ships authorized to make and making such seizures*, in addition to the amount which may be payable in respect of the moiety of the proceeds of such sale as hereinbefore mentioned, a further bounty on the tonnage of such ship or vessel at the rate of one pound ten shillings for every ton of such tonnage."

Sect. 6. "The bounties payable under this or any other Act of Parliament for the seizure of slaves, and vessels fitted out for or engaged in the traffic of slaves, shall be paid to and distributed amongst the commanders, officers and crews of *her Majesty's ships engaged in the seizure thereof* in such manner and proportion and to and amongst such persons as by any order in council or proclamation of his late Majesty King William the Fourth at present in force hath been, or by any order in council or proclamation of her present Majesty, her heirs or successors, shall be for that purpose ordered and directed."

The proclamation in force at the time of the seizure was that dated 29th December, 1853, but it contained no provision with respect to joint capture.

The Queen's Advocate (Sir R. Phillimore), and *Middleton*, against the admission of the petition.—The statute vests the bounty in those “making the seizure” or “engaged in the seizure.” The facts stated do not support the claim of joint capture. The doctrine of constructive capture is not to be extended: *Vryheid* (a); *Aviso* (b). Here there was between the two vessels no association, neither was there co-operation. It is not even pleaded that the Falcon was in sight of the slaver, which would appear to be in this as in prize cases an indispensable condition: *Sociedade Feliz* (c). But if she was in sight, the presumption of the animus capiendi, which is usually to be attributed to a Queen's ship, is here rebutted by the fact that the Falcon deliberately took no part in the chase, and continued on her course to Ascension: *Drie Gebroeders* (d); *La Flore* (e). There was no actual “contribution of endeavour,” *Vryheid* (f), which, says Lord Stowell, “there must be, as well as a general intention.” The log is clearly inadmissible in evidence: *Sociedade Feliz* (g).

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Deane, Q.C., and *Lushington*, contra.—“The general rule certainly is, that sight alone is sufficient to entitle King's ships to be considered as joint captors, and it is a rule that is liable to very few exceptions:” *Galen* (h). Here an animus capiendi on the part of the Falcon is clearly to be inferred from the facts stated in the petition. It would, indeed, be absurd to require every one of her Majesty's ships present to get up steam to chase a prize in a calm, when any one of her consorts is sufficient. The rule as to proving sight is not to be applied with the same strictness to slave cases as to prize cases; *Sociedade Feliz* (i); *Brazil* (k); and here it may be obviously inferred that the Falcon was in sight of the prize, as well as the prize in sight of the Falcon.

The *Queen's Advocate* replied.

DR. LUSHINGTON.—This is a claim preferred by her Majesty's ship the Falcon to be declared joint captor with her Majesty's ship the Dart, in respect of the capture of a slave vessel effected by the Dart on the 11th of July, 1862. A petition on behalf of the Falcon having been filed, its admission is now opposed

Judgment.

(a) 2 C. Rob. 22.

(b) 2 Hagg. 36, 37.

(c) 1 W. Rob. 309; 2 W. Rob. 164.

(d) 5 C. Rob. 342.

(e) 5 C. Rob. 269.

(f) 2 C. Rob. 30.

(g) 1 W. Rob. 311.

(h) 2 Dodson, 24.

(i) 2 W. Rob. 159.

(k) Swabey, 79.

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case.

on behalf of the Dart, and it is contended, that, assuming all the facts here pleaded to be true, they do not establish the claim of the Falcon to share as joint captor.

The material facts stated in the petition are as follows:—

Both vessels left Loando in company on the 10th July, but with different objects in view. The Dart was on a cruise for the suppression of the slave trade. The Falcon was bound to the Isle of Ascension, on her way to England, but she was, as well as the Dart, duly authorized to capture vessels engaged in the slave trade. At daylight on the 11th the Dart was about a mile and a-half distant from the Falcon. The slave vessel was seen seven or eight miles distant. At 7 A.M. she was discovered to be a brig, and observed to make additional sail. About half-past nine the Dart was observed to alter her course, and at eleven to proceed under steam in chase. About noon, the Dart bore S.W. of the Falcon, the prize S. by W., distant seven miles, and continued at the same distance till after the capture. About half-past one the Dart was seen from the deck of the Falcon to close with the brig to capture her. The brig remained in sight from the Falcon till dark, 6 P.M. The Dart went in chase of another vessel, but returned and took the brig in tow. During the day the Falcon had remained under plain sail on a wind making little progress. She did not join the chase because the Dart was sufficient for the purpose, and if the brig kept away she must necessarily near the Falcon.

The case of the Falcon then is this:—being in sight, or rather seeing the prize, the chase and capture, with power to have joined in the chase, but abstaining therefrom, because her consort needed no assistance, and, moreover, preventing the prize from escaping in one direction.

Averment and proof that the alleged joint captor was seen by those on board the prize before capture are important, but are not absolutely required, as in cases of prize of war.

The first observation I am called on to make is, that it is not pleaded that either before or at the time of the capture the Falcon was actually seen from the prize. Now, whether the Falcon was actually seen from the prize or not is of no small importance in a case of joint capture; and so the authorities show, and for good reason, because it is by intimidation, actual or constructive, that a claim for joint capture is supported. I know not whether this omission was intentional or otherwise; it might be intentional, because there is a difficulty in procuring evidence of such fact in the case of the capture of slave ships, which did not exist in ordinary cases of joint capture during the former war, and hence also the averment and proof of such fact are not with respect to the capture of slave ships necessarily required (a).

Then, proceeding on the supposition that the being in sight is clearly proved, what is the law? Assuming it to be the same as in ordinary cases of joint capture—a question which has been previously determined (a)—the being in sight is a *primâ facie* title to be considered a joint captor. This rule is sustained by many authorities, of which I cite one only, *La Flore*, reported 5 C. Rob. 268, where Lord Stowell said that being in sight *primâ facie* supports a claim to joint capture, unless it be shown that the vessel so claiming was pursuing a contrary route, which is not the case here. Some exceptions have been introduced to this rule, but I need not enumerate them. They rest on facts, which it would be difficult to describe except in detail, but which are supposed to rebut the presumption of the *animus capiendi*. Were there any such facts in this case? It was the duty of the *Falcon* to proceed to the Island of Ascension and so to England, and she was so proceeding; but being authorized to seize slave vessels, and consequently ordered so to do, it was also her duty to seize such vessels if she fell in with them in her destined course, and also to assist other vessels engaged in the suppression of the slave trade. Her destination to Ascension, therefore, was by no means inconsistent with the *animus capiendi*. Then, further, the *Falcon* did not join in the chase, but this was because her captain deemed it unnecessary, which, indeed, according to the circumstances stated, it was, and also because one chance of escape was stopped by the course the *Falcon* was pursuing. Now, speaking of this petition only, and with no reference to other facts which may appear at the hearing, I am of opinion that the circumstances do not form an exception to the general rule, that being in sight gives a *primâ facie* title to claim as joint captor. I admit the petition, and, if the petitioners desire it, will allow them to amend the petition by pleading that at the time of the capture the *Falcon* was seen from the prize. As to the log, I reserve my opinion as to whether it is admissible evidence or not; and I reserve it for this reason, that the authorities are very contradictory. The costs will be costs in the cause.

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Being in sight
is a *primâ
facie* title to
joint capture;

and here the
facts do not
rebut the
*animus capi-
endi*.

Afterwards, on an affidavit being filed by the plaintiff's solicitor, that upon inspection of documents in the Registry (of the

(a) *Aviso*, 2 Hagg. 31.

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Admiralty Court) it appeared that the vessel had been adjudicated upon and condemned by the Vice-Admiralty Court of Sierra Leone, on the 18th September, 1862, and that the sum of 1,177*l.* had been awarded as tonnage on the bounty, the Court, with the consent of the defendants, decreed that the plaintiffs were joint captors, and directed the costs of the cause, both of the plaintiffs and the defendants, to be paid out of the bounty.

Nelson & Son, proctors for the plaintiffs.

Burchett, proctor for the defendants.



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THE NORWAY (a).

Lien for freight and general average—Right of assignee of bill of lading to sue; 18 & 19 Vict. c. 111, s. 1; 24 Vict. c. 10, s. 5—Rights of deducting from lump freight “payable as per charter-party” part freight forfeited under guarantee “to carry 3,000 tons cargo or to forfeit freight in proportion to deficiency;” address commission; part freight in respect of cargo lost by shipowner’s negligence—Waiver of tender by peremptorily demanding excessive sum and withholding necessary papers—Evidence of negligent navigation—Duty of master in respect of place and manner of discharging cargo; 25 & 26 Vict. c. 63, s. 67—Reference to Registrar and Merchants.

A tender of money due may be waived by the creditor persisting in making an excessive demand and refusing to listen to any proposition to take less.

A creditor having a lien upon a debtor’s goods for an unascertained amount, dependent upon a complicated account, the particulars of which are partly in possession of him, the creditor, alone, will be held to waive any tender for the amount really due, if on demand of the goods he wilfully withholds from the debtor the information (including papers) necessary to enable him to ascertain the amount due.

A cargo of rice for a foreign ship was bought at Rangoon by the firm of Ashburner & Co., on joint account for themselves and one De Mattos, a merchant in England. The bills of lading were indorsed by the firm to Mr. Ashburner, the plaintiff, member and representative of their firm in this country, for the purpose of realizing the cargo on arrival. De Mattos being indebted in other transactions to the firm of Ashburner & Co. in a large sum, exceeding half the value of the cargo, directed Mr. Ashburner to apply any profit that might be due to him (De Mattos) upon the sale of the cargo to reduction of his general account with the firm:

Held, that the property of the cargo was in the plaintiff, and that he, alleging breaches of contract and breaches of duty on the part of the master of the ship in respect of the cargo, was entitled to sue the ship upon the bill of lading under the 5th section of the statute 24 Vict. c. 10.—(Admiralty Court Act, 1861.)

The bills of lading for the rice made “freight payable as per charter-party.” This charter-party was between De Mattos and the master of the ship. The master undertook “to take out a cargo of salt from Liverpool to Calcutta, and there, after discharge, reload, or at freighter’s option proceed to Rangoon, Akyab or Bassein, and there load a full cargo of lawful merchandise, and therewith proceed to Falmouth for orders to proceed to London or Liverpool or (other specified ports), or so near thereunto as she might safely get, and deliver the same.” In consideration whereof the merchant agreed to pay “as freight for the use and hire of the said vessel 11,250*l.* lump sum, the master guaranteeing to carry 3,000 tons dead weight of cargo upon a draft of twenty-six feet water, or to forfeit freight in proportion of deficiency:”

(a) See same case on appeal, reported post, p. 404.

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The stipulation for the mode of payment of the freight provided for instalments and advances during the voyage, concluding, "the balance as follows: viz. one-third in cash, on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the said port of discharge by good and approved bills payable in London, or cash equal to three months' date from the delivery." Other stipulations followed; amongst them: "the vessel to be addressed at all ports to freighter's agent, paying one commission only on this charter, not exceeding 5 per cent." "For the payment of all freight, dead freight, demurrage or other charges, the master or owners shall have an absolute lien on the said cargo laden on board:"

The homeward cargo was shipped at Rangoon. In going down the Rangoon river, the ship took the ground; in consequence of which she afterwards leaked, and the master was thereby obliged to jettison part of the cargo, and put into a port of refuge and sell another part of the cargo sea-damaged. The master then sailed with the residue of the cargo on board, and arriving at Falmouth was ordered to proceed to Liverpool. At Liverpool a dispute arose as to the amount due on the cargo for freight and general average, and the master peremptorily refused delivery except on receipt of a certain sum, which the plaintiff declined to pay. The master also refused to go into one of the closed docks as requested by the plaintiff, and went into another dock, whereby certain additional expenses would necessarily be incurred by the owner of the cargo:

The plaintiff then instituted this cause under the 5th section of the Admiralty Court Act, claiming damages for non-delivery and other breaches of contract:

Held, that the master's guarantee was not a guarantee that the ship should actually carry 3,000 tons on the homeward voyage, either to the port of discharge, or from the port of shipment, but a guarantee of the capacity of the ship that she could carry 3,000 tons, and that she could do so upon a draft of twenty-six feet water, and that as loading was contemplated in rice ports which are situate in rivers, the word "water" meant water at the place of loading, whether fresh or salt. This guarantee being broken:

Held, that "the forfeiture of freight in proportion to deficiency" was a forfeiture of such a proportion of the lump freight as corresponded to the deficiency from 3,000 tons of such carrying capacity of the ship, and that in assessing the amount to which the master's lien for freight extended against the plaintiff as the holder of the bills of lading for the entire cargo, making freight payable as per charter-party, the plaintiff was entitled to the benefit of the forfeiture of part freight under the guarantee.

The Court also directed the Registrar and Merchants to report whether the plaintiff was entitled to deduct from the freight the address commission.

The Court having found upon the evidence that the grounding of the ship had been occasioned by the negligent navigation of a pilot who was not employed by compulsion of law, and that the loss to the owner of the cargo by the consequent jettison and sale was in law occasioned by the negligence of the ship-owner:

Held, that the ship was liable under the statute in damages for the nett value of the rice so lost, viz. the value of the rice in a sound state at the time and place of delivery, less the proportion of freight and necessary charges on account thereof.

Held also, that in assessing the amount of the master's lien for freight, the plaintiff could not deduct the value of the part cargo so lost by the shipowner's negligence, but was entitled to deduct a proportionate part of the lump freight.

Held also, that the plaintiff was entitled to damages for non-delivery of the residue of the cargo, notwithstanding that he had made no sufficient tender of the freight and general average due thereon, for that the master had in law waived any such tender,

1st. By demanding an excessive sum in such a manner as to dispense with any offer of a smaller sum;

2ndly. By withholding from the plaintiff the papers in his possession necessary to calculate the amount really due, such papers being—

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1. A pro forma freight account showing all the deductions from the lump freight, and the sum total claimed :

2. A memorandum from an average adjuster as to the probable amount of contribution from the cargo for general average :

3. The particulars of the tonnage shipped at the rice port ; the particulars of the jettison ; the surveys and account sales at the port of refuge.

Held also, that the withholding such papers was a breach of duty by the master, giving a right of action under the Admiralty Court Act.

Held also, that the master was not bound to discharge in any particular dock named by the holder of the bills of lading, but was justified in discharging the rice on any wharf in the port of discharge on which goods of a like nature are usually placed.—25 & 26 Vict. c. 63, s. 67.

After the filing of the plaintiff's petition, the master, who had previously entered the cargo inwards, the plaintiff in the circumstances declining to do so, employed a master porter to land the rice. In landing the rice, the master porter did not "assort" it as is usual with rice cargoes in anywise damaged, and thereby the rice became depreciated in value. At the hearing the plaintiff gave evidence of this non-assortment and consequent depreciation of the rice. The Court, having found that the master had wrongfully refused delivery to the plaintiff,

Held, that the master having taken upon himself to land the cargo was bound to have "assorted" it in the usual manner and that the ship was liable for the damages caused by the non-assortment.

After the landing of the cargo and during the progress of the cause the plaintiff obtained delivery upon paying into Court a certain sum of money. The Court in its decree directed the Registrar and Merchants to take an account of the freight due in respect of the cargo according to the positions laid down in the judgment, of the damages pronounced for, and of the amount, if any, due for general average contribution from the cargo ; and to report the balance.

THE argument on the demurrer to the petition in this case is reported ante, p. 226.

The answer of the defendants was in substance a denial of the several statements of the petition ; but it alleged that the jettison and sale of part cargo had been necessitated by perils of the seas.

The trial which followed occupied four days. The results of the evidence, the points insisted upon by counsel, and the authorities cited, will be found stated in the following judgment.

The provisions for the delivery of goods which are warehoused in warehouses belonging to the Mersey Docks and Harbour Board, subject to lien for freight, are contained in the Act 21 & 22 Vict. c. xcii. ss. 193—199. The Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63, ss. 66—78) contains similar provisions applicable to goods wheresoever so warehoused. The provisions for entering goods inwards are to be found in 16 & 17 Vict. c. 107, s. 50 et seq.

Lush, Q.C., and *Lushington*, for the plaintiff.

Brett, Q.C., and *Cohen*, for the defendants.

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Judgment.

DR. LUSHINGTON.—The parties to this suit are the plaintiff, Mr. George Ashburner, a partner in a mercantile house at Calcutta, suing as owner and assignee of bills of lading; and the defendants are the owners of the Norway, an American vessel. The owners are not domiciled in this country. The action is brought under the 6th section of the Admiralty Court Act, 1861, for breaches of contract and breaches of duty by the master with respect to the goods comprised in the bills of lading. One of these breaches was non-delivery of the cargo. The petition was filed on the 19th of January, 1864. Objections were taken to its admissibility, and on the 12th of February following the Court ordered it to be reformed.

On the 22nd of March, an order was made by the consent of both parties to the effect that, on payment to the master, by the plaintiff, of 3,461*l.* 13*s.* 2*d.* (the balance of freight stated by the plaintiff to be due in respect of the cargo), and on the plaintiff depositing in the registry a note for 5,250*l.* to answer any further claims of the master for freight and general average, and on the bills of lading being filed in the registry, and on an undertaking being given by the plaintiff to indemnify the defendants against any loss that they might sustain through the delivery of the cargo, the cargo should be released and possession thereof given to the plaintiff. On the 1st of April the plaintiff, under this order, obtained possession of the cargo. On the 5th of April, under another order of the Court, made by consent, the plaintiff paid to Messrs. Taylor, the defendants' agents, in respect of the cargo, 845*l.* 6*s.* 8*d.* for landing charges, reserving any question in respect of the same for the decision of the Court. The cargo has since been sold by the plaintiff. After the alterations had been made in the petition the pleadings were concluded, evidence was taken and the case fully discussed, and now it is my duty to give my judgment.

The property
in the cargo
passed to the
plaintiff, and he
is therefore
entitled to sue.

The defendants have taken a preliminary objection to the title of the plaintiff to sue, and the objection, as I understand it, is that the plaintiff has no beneficial interest in these bills of lading. The plaintiff, on the other hand, avers in his petition that, at the time of the institution of the cause, he was the owner of all the rice covered by the bills of lading. The law upon this point is clear. The judgment in the *St. Cloud* (a) decided that, under the 6th section of the Admiralty Court Act, 1861, the Court will not entertain a claim made by the bare assignee of a bill of lading, and to that judgment I adhere.

(a) Ante, p. 4.

What, then, is the position of the plaintiff? I must briefly state the facts necessary to determine this question.

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In November, 1861, a charter-party is made by which the master of the *Norway* charters his ship to a Mr. De Mattos to carry a cargo of salt to Calcutta, and bring back a cargo from thence, or from one of certain rice ports in the charter-party named. Whilst the vessel is still on her outward voyage, De Mattos agrees with Ashburner & Co., of Calcutta, a firm of which the plaintiff is partner, and the representative in England, that the homeward shipment should be on joint account, each a moiety; the firm of Ashburner & Co. to purchase the cargo, and to manage the matter of the shipment. The *Norway* is sent to Rangoon to take in a cargo of rice. Ashburner & Co. employ the Burmah Company to furnish the rice, and Ashburner & Co. pay for it. Cargo is shipped, and bills of lading for the same are endorsed by the Burmah Company and their agent, to Ashburner & Co., at Calcutta. Ashburner & Co. then draw bills on De Mattos for the whole amount of the purchase-money, 16,422*l.* 9*s.* 9*d.*, and send these bills and the bills of lading to the Union Bank, in England, to be dealt with as follows:—De Mattos was to accept these bills of exchange and to pay the whole amount into the Bank to the credit of Ashburner & Co.; until the acceptances were duly met, the Bank was to retain the bills of lading. Ultimately, had matters remained unchanged, I presume, though it is not mentioned, Ashburner & Co., in their account with De Mattos, would allow him half the amount so paid into the Bank, while De Mattos would debit himself, in favour of Ashburner & Co., with half of the proceeds of the cargo. For the adventure was a joint adventure. But this arrangement was subsequently altered. The vessel, under circumstances to be hereafter narrated, was obliged to deviate from her course, and to put into Mauritius, where she was detained. On the 22nd of October, De Mattos writes to Ashburner—

“The *Norway*, as you are aware, by putting into Mauritius, has been delayed some three months extra in her voyage, and hence her bills are falling due prior to her arrival. Under these circumstances, I shall be glad if you will arrange to hold the bills drawn against the cargo over until after her arrival and discharge. Of course, this arrangement will in no way affect the liabilities in regard to this cargo.”

On the 26th October, he wrote again to Ashburner—

“In handing you the remainder of the policies on the *Norway*, I hereby give you full power and authority to deal with my

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interest in that vessel as you may deem best. You will please carry to my account with you any surplus arising from the sale of the cargo, or the realization of the policies after the payment of the bills against the cargo, amounting to about 16,422*l.* 19*s.* 9*d.*”

On the 6th of November, De Mattos writes further to Ashburner—

“I think that the recent rise in the price of rice will enable you to reimburse yourself fully from the sale of the Norway's cargo for the advance of 3,500*l.* you are about to make to the Union Bank to withdraw my acceptances there. In this case it is fully understood and agreed between us, that the said surplus on the cargo of the Norway is to be applied, in the first instance, to liquidate the said advance of 3,500*l.*, with interest ; after which, the balance, if any, is to be applied to the general account for your other advances to me.”

At this time De Mattos was indebted to Ashburner on his general account (in addition to the bills drawn against the cargo) in the sum of about 13,000*l.* Ashburner accepted the proposition, and agreed with the Union Bank for the withdrawal of the bills against the cargo. The result, accordingly, was this :—Under the original arrangement Ashburner, as partner and representative of his firm, was the legal owner of the bills of lading, subject to any lien upon them which might be exercised by the Bank to secure their current account with Ashburner & Co., and with the understanding that the bills of lading should be assigned to De Mattos, if he should meet the bills of exchange. Then as to the cargo covered by these bills of lading, one-half would belong to Ashburner, as representative of his firm ; the other half would belong to De Mattos. Under the new arrangement Ashburner, as before, remained the legal holder of the bills of lading, but now free from any undertaking that they should be assigned to De Mattos ; and as to the cargo he remained, as before, entitled to one-half as representative of his firm ; but as to the other half he became equitable assignee from De Mattos, in trust to apply the proceeds as follows :—1st, to satisfy one-half of the price of the cargo which would have been payable to Ashburner & Co. by De Mattos. 2nd, to reimburse himself the 3,500*l.* advanced by him personally to the Bank for De Mattos. 3rd, to pay off any debt due from De Mattos to Ashburner personally upon their general account. Then, if any residue was left, Ashburner would, of course, hold this for De Mattos. But no residue could be anticipated, because, in addition to the bills drawn against the cargo,

and this sum of 3,500*l.*, the debt from De Mattos to Ashburner at this time exceeded 13,000*l.* De Mattos in his letters never even refers to such an ultimate residue as a possible contingency. These trusts, then, were substantially for the benefit of Ashburner personally, and also as the representative of his firm. De Mattos ceased to be interested in this cargo, otherwise than that it was to his advantage that the cargo should turn out well; for the higher price it fetched the greater would be the reduction of his debt to Ashburner. Then De Mattos expressly authorizes Ashburner to deal as he saw fit with the interest so assigned to him; but at the same time it was arranged between them that, as Ashburner lived in the country, and had no place of business of his own, and had not been conversant with the affair from the beginning, that De Mattos should carry on the correspondence for Ashburner, and all letters for Ashburner should be forwarded to him at De Mattos' office. There is only one further fact that requires to be stated. When the vessel arrived, the Union Bank without hesitation handed over the bills of lading to Ashburner. Under these circumstances, I am of opinion that Ashburner was not only the legal holder of these bills of lading, but also that, by the assignment, the property comprised in the bills of lading passed to him as an individual person, and the representative of his firm; that he has a right to sue the ship in this Court under the 6th section of the Admiralty Court Act, 1861.

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I now proceed to the consideration of the merits of the case.

The charter-party was executed in London on the 2nd of November, 1861, between Captain Major, master of the Norway, and De Mattos. It was as follows:—

Construction of
charter-party
and bills of
lading.

MEMORANDUM FOR CHARTER (a).

“ London, 2nd November, 1861.

“ It is this day mutually agreed between Captain H. B. Major, of the good ship or vessel called the Norway, A. 1, of the burthen of 2,078 tons per register, or thereabouts, now lying in the port of Liverpool, whereof he is at present master, of the one part, and W. N. De Mattos, Esq., of London, merchant and freighter, of the other part: That the said ship, being tight, staunch and strong, and every way fitted for the voyage, shall, with all convenient speed, be made ready and load *at Liverpool a cargo of salt, not exceeding 2,200 tons, and therewith pro-*

(a) The words in *Italics* in this charter-party are the more material passages.—REP.

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ceed to Calcutta, and after the discharge of the outward cargo reload (or at freighter's option proceed to Rangoon, Akyab or Bassien) a full and complete cargo of lawful merchandise, not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, provisions and furniture, and being so loaded shall therewith proceed to Cowes, Queenstown or Falmouth, at master's option, for orders to proceed to London, Liverpool, Bordeaux, Havre, Antwerp or Marseilles, or so near thereunto as she may safely get and deliver the same, agreeably to bills of lading, and so end the voyage; (restraints of princes and rulers, the dangers of the seas and navigation, fire, pirates, and enemies during the said voyage always excepted;) ninety days are to be allowed the said merchant (if the ship be not sooner despatched) for discharging the outward cargo of salt, and loading at Calcutta or the rice ports, and the vessel to be unloaded at port of discharge according to the custom of the port; the freighter having the option of keeping the said vessel on demurrage, to the extent of 10 days, over and above the said laying days, if so required.

“In consideration whereof, and everything before mentioned, the said merchant does hereby promise and agree to load and receive, or cause to be laden and received in the manner and within the time herein mentioned for these purposes, and pay, or cause to be paid as freight, for the use and hire of the said vessel, 11,250l., lump sum, if ordered to the United Kingdom, Havre or Bordeaux; 11,625l. if ordered to Antwerp or Marseilles; the master guaranteeing to carry 3,000 tons dead weight of cargo, upon a draft of 26 feet of water, or to forfeit freight in proportion to deficiency; the vessel to be loaded at port of loading, to such a draft of water as the freighter or his agents may, in connexion with the pilot commissioners, consider safe to proceed to sea; lighterage, if any, to fill up the ship below the flats, to be at freighter's expense, payment whereof to become due and to be paid as follows, viz.:—2,000l. to be advanced on the vessel's clearing at Liverpool, subject to insurance only, say 1,000l., by freighter's acceptance, at 4 months, and 1,000l. at 6 months, sufficient cash for ship's disbursements, not exceeding 2,500l., to be advanced at Calcutta, and the necessary disbursements, if ordered to the rice ports, subject to interest and insurance only, all at current rate of exchange for 6 months' bills on London against the captain's receipts, such advances to be made on account of chartered freight, and the balance as follows, viz.:—one-third in cash, on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the said port of discharge, by good and approved bills, payable in

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London, or cash equal to 3 months' date from the delivery, if discharged in the United Kingdom, or in cash, at current rate of exchange, if discharged on the Continent, less 3 months' interest, and also to pay for each and every day the vessel is detained beyond the times hereinbefore mentioned demurrage at the rate of thirty pounds sterling money per day, to be paid day by day, or as the owner or captain may agree for it otherwise. The master shall sign bills of lading as tendered, without prejudice to this charter-party. The vessel, if ordered from Calcutta to load at the rice ports, to proceed within 48 hours, wind and weather permitting, after receiving her despatches to sail; the customary port charges and towage at the rice ports to be borne by the freighter, as well as the actual cost of ballasting required for the ship at Calcutta; the cargo to be taken to and taken from alongside at merchant's risk and expense; the vessel to be addressed at all ports to freighter's agent, paying one commission only on this charter, not exceeding 5 per cent.; and for the true performance hereof the said parties hereunto bind themselves, their respective heirs, executors, assigns, the said vessel, her freight and appurtenances, and the said freighter the cargo to be laden on board the said vessel, each unto the other, in the penal sum of twelve thousand pounds, of good and lawful money of Great Britain, it being agreed that for the payment of all freight, dead freight, demurrage, or other charges, the said master or owners shall have an absolute lien and charge on the said cargo or goods laden on board. The brokerage on this charter-party, five per cent., is due by the ship, on perfecting this agreement, to Pilkington Brothers. In witness whereof the said parties have hereunto subscribed their names.

"H. B. MAJOR.

"W. N. DE MATTOS."

Before the arrival of the vessel at Calcutta, an agreement was made, as I have before stated, between De Mattos and Ashburner & Co., that the homeward shipment should be on joint account, each a moiety, the firm of Ashburner & Co. to purchase the cargo and manage the matter of the shipment. In pursuance of the charter-party, the Norway proceeded to Calcutta, and discharged her outward cargo. On arrival there, on or about the 15th day of May, 1862, it was agreed between Ashburner & Co. and the master of the Norway, that the Norway might go an intermediate voyage to Bombay without prejudice to the charter-party, and thence proceed to the port of loading according to the order of Ashburner & Co., there to load homeward, according to the charter-party. And it was further agreed be-

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tween them that Ashburner & Co. should advance moneys for the disbursements of the ship at Bombay, and that the same should be considered as advances of freight in pursuance of the charter-party, and should be deducted from the charter freight; provided the said advances, together with the advances at Calcutta, should not exceed the sum of 2,500*l.* mentioned in the charter-party. The Norway accordingly went to Bombay, and thence in ballast, by order of Ashburner & Co., to Rangoon, there to load rice in pursuance of the charter-party, from the Burmah Company (Limited), who were the agents of Ashburner & Co. at that place.

In the beginning of March, 1863, the Norway, having arrived at the port of Rangoon, commenced to load rice there from the Burmah Company, who furnished it on account of Ashburner & Co.

The ship was first loaded at Rangoon itself up to a draught of eighteen feet, and then taken down the Irawaddy River, a few miles over the Hastings Flat, there to take in further cargo, which was brought by lighters, hired by the Burmah Company. In this manner the ship now loaded until she drew twenty-five feet, and then she had on board 32,600 bags of rice weighing 2,698 tons (exclusive of some tons of dunnage); that is, some 300 short of 3,000 tons. The 36,200 bags of rice thus loaded consisted of four parcels; and in respect of these parcels the master of the Norway signed four bills of lading. The bill of lading for the first parcel (to which the bills of lading for the other parcels *mutatis mutandis* correspond) was in the following form; (the words in *Italics* being in writing in the original documents):—

“Shipped in good order and well conditioned by the Burmah Company (Limited), in and upon the good ship called the *Norway*, whereof is master for this present voyage *H. B. Major*, and now riding at anchor in the *Rangoon River*, and bound for *Cowes, Queenstown, or Falmouth* for orders as per charter-party.”

“*Thirteen thousand bags of cargo rice*, being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the port of *discharge* (the act of God, the Queen’s enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto *order* or to assigns, freight for the said goods *payable as per charty-party*, with *primage* and *average* accustomed. In witness whereof the master or purser of the said ship hath affirmed to *three* bills

BCL
A
13,000
bags.
X

of lading, all of this tenor and date, the one of which *three* bills being accomplished, the other *two* to stand void.

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“ Dated in *Rangoon*, 10th *March*, 1863.

“ *H. B. MAJOR.*”

These bills of lading were endorsed by the Burmah Company and Mr. Cator, as I have stated, and forwarded to Ashburner & Co., at Calcutta. The subsequent arrangement as to the cargo has also been already fully stated, and need not now be repeated.

These facts are sufficient to enable the Court to pronounce its interpretation of the bill of lading, and of so much of the charter-party as is incorporated therein; and as one of the principal points in dispute was whether, under the terms of the bill of lading and the charter-party, any, and, if any, then what deduction was to be made from the lump freight, in consequence of less than 3,000 tons of cargo having been shipped on board the *Norway*, I think it will be convenient if, before entering upon the subsequent history, I proceed to consider the construction of these documents.

The freight is stated in the bills of lading to be “ freight payable as per charter.” The Court is therefore referred to the charter-party, but only for the purpose of ascertaining the amount of freight. The construction of this charter-party is full of difficulties. In attempting to put a construction upon any doubtful provision which may be found in this charter, it must be borne in mind that it is a mercantile instrument, that the parties must be presumed to have intended to have carried out a fair mercantile transaction, the master to obtain a fair remunerative employment for his ship, the charterer to acquire a conveyance for his merchandise at a reasonable rate. If any of the provisions of the charter are found doubtful, or capable of two constructions, the construction to be adopted must be, if the words of the charter will permit, that most consonant to mercantile usage, and most consistent with equity. Both parties must be presumed to have had an adequate knowledge of the nature of the adventure in which they had mutually engaged.

What, then, are the stipulations in the charter as to freight? I think they occupy the whole clause beginning with—“ In consideration of,” and ending “ less three months’ interest.” After naming 11,250*l.* as the freight payable if the ship is ordered to the United Kingdom, the charter-party contains these words:—“ The master guaranteeing to carry 3,000 tons dead weight of cargo upon a draft of twenty-six feet of water, or to forfeit freight in proportion to deficiency.” I think this guarantee is a two-fold one, viz.:—1st, that the ship was large enough to carry

The true meaning of the guarantee was not a guarantee absolutely to carry 3,000 tons on the voyage home; but a guarantee that the ship could carry 3,000 tons, and could do so upon a draft of

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26 feet water,
whether the
water were
fresh or salt at
the place of
loading.

3,000 tons. 2nd, that her build was such that she could carry the 3,000 tons upon a draft of twenty-six feet of water. I think this was a most natural guarantee for a charterer to require with respect to a vessel which he contemplated loading at a rice port like Rangoon, which was separated from the sea by a river channel of some thirty miles long, or more. I hold that it was not a promise on the part of the master that, in this particular voyage home, he would carry 3,000 tons. For, at the time when the charter was executed, it was not settled for certain from what port the vessel should load for the home voyage; the selection lay with the freighter, he might choose either Calcutta, Rangoon, Akyab, or Bassien; and it is not impossible that the river channel from one of these ports might not be navigable for a vessel drawing twenty-six feet of water. The shipowner, therefore, could not with prudence covenant absolutely to carry 3,000 tons. What he covenants is, that his vessel was capable of carrying three thousand tons, and this upon a draft of twenty-six feet of water; and, further, that she should take on board a full cargo compatible with safety. Hence, after the guarantee, is added the clause:—"The vessel to be loaded at port of lading to such draft of water as the freighter or his agents may, in connexion with the pilot commissioners, consider safe to proceed to sea." The interest of the freighter was to be protected by his agent, the safety of the vessel by the pilot commissioners. I think this covenant as to the loading of the vessel was a separate covenant from the previous covenant as to her capacity in connexion with her draft; and that the clause of "forfeiture in proportion to the deficiency" refers, as its place denotes, only to the first covenant, and not to the covenant as to loading; though, if through the default of the master the vessel had not been loaded to the draft which the freighter's agent and the pilot commissioners had pronounced safe, the charterer would have had a right of action for damages.

The guarantee then being, as I hold, a guarantee that the vessel was of a capacity to carry 3,000 tons, and this upon a draft of twenty-six feet of water, a further question arises what is the meaning of the word "water?" The question is of importance, because: 1st.—It is an undoubted fact that a vessel will float at a less draft in sea water than in fresh. It appears in the evidence that for every fifteen feet which a vessel draws in salt water it is necessary to add six inches in order to ascertain her draft in fresh water. 2nd.—In this case it is clear that the vessel could carry 3,000 tons of cargo in sea water at a draft of twenty-six feet, but that she could not do so in fresh water.

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For, at Hastings, where the water was nearly fresh, the Norway drew twenty-five feet, with 2,698 tons of cargo on board; with a draft of twenty-six feet she would have carried, as the master states, 220 tons more, or 2,918 tons in all; that is, eighty-two tons short of 3,000. Had the water been salt, it follows, from what has been stated, that the Norway might easily have carried these eighty-two tons, *i.e.*, in all 3,000 tons, without drawing more than twenty-six feet.

To solve this question as to the meaning of the word "water," the Court must look to the terms of the charter itself. Taken alone, the term is capable of either construction; the meaning is ambiguous. This being so, it is lawful to look to the whole of the charter to discover what light can be thrown upon a doubtful part. I think that the fair inference from the charter is, that, in settling the stipulations as to the capacity and draft of the ship, both parties, the master and the charterer, contemplated the *locus in quo* of the intended shipment of cargo—viz., a rice port in India, intercepted from the sea by a river channel, and where the water was necessarily more or less fresh. The taking in cargo at sea was not contemplated. The provision as to loading to such a draft as might be safe for the vessel to proceed to sea, and the provision as to lighterage, if any, to fill up the ship below the flats, to be at the freighter's expense, show this. I think, therefore, that the guarantee meant that the vessel should be capable of carrying 3,000 tons upon a draft of twenty-six feet during the whole time of taking in, and until she reached the open sea—that is, during the whole period when the question of her draft could be of any importance. And during the early part of her voyage it was all-important to the freighters that the vessel should be able to carry 3,000 tons upon a draft of twenty-six feet, because otherwise, if either her capacity had been smaller, or the draft greater, a smaller cargo would necessarily be shipped.

But consider what would be the effect of a contrary construction of holding that the stipulation as to the twenty-six feet applied only to salt water, and not to fresh. It would be a stipulation without any rational object, for the rice once on board and the vessel in the open sea, what could it signify whether the ship drew twenty-six or twenty-seven feet of water? Again, such a construction confining the meaning to sea water, would dislocate this condition from all the surrounding provisions of the charter, which clearly point to the loading of the ship in the river, and not at sea. I do not, therefore, accede to the argument on the part of the defendants, that this guarantee by the master of the capacity of his vessel in connexion with her draft had reference to her ordinary sea-going draft; and that it was left to the

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charterer to take into account for himself the difference, however well known, of the draft of a vessel in fresh water from the draft of the same vessel in salt water ; and I do not consider that the case of *Pust v. Dowie* (a), to which I was referred, is applicable to the present case. Accordingly, inasmuch as at Hastings, where the loading was completed, the vessel could not carry 3,000 tons upon a draft of twenty-six feet, I am of opinion that the guarantee was broken, and that forfeiture of freight must take effect.

It still remains to interpret the phrase "to forfeit freight in proportion to the deficiency." By "freight" I think is meant the only thing that is called freight in the charter—the lump freight, which, under the circumstances that have actually happened, is 11,250*l*. I think it quite clear, that in fixing the freight, the parties to the charter-party were looking to the homeward cargo only ; in truth, the object of the adventure was not the carrying out salt, but the bringing home rice ; and by the deficiency is meant the difference between 3,000 tons which the vessel was guaranteed to be capable of carrying upon a draft of twenty-six feet, and the 2,918 tons which, on the evidence of the master, it appears she could actually have carried on that draft in the Irawaddy ; in other words, the allowance will be on the deficiency of eighty-two tons. The exact sum will be ascertained by the Registrar and Merchants, to whom I shall refer the matter.

The master had a lien for the whole balance of the freight.

Before I leave the charter-party, I will dispose of some other questions that have arisen upon its construction. I am of opinion that the master had a lien for the whole of the balance of the freight, that is, not only for the two-thirds of that balance which were payable by bills upon the true and final delivery of the cargo at the port of discharge until the bills were given, but also in virtue of the lien which he had reserved to himself, in express terms at the end of the charter-party, upon the one-third of the balance, payable in cash, on arrival of the vessel at the port of delivery.

The right of the plaintiff to deduct from the freight the address commission referred to the Registrar and Merchants.

Then as to the right of the plaintiff to deduct address commission from the freight, evidence was given on behalf of the plaintiff, that in a case like the present, where the bills of lading declare "the freight to be payable as per charter-party," and the charter-party provides "that the vessel shall be addressed at all ports to the freighter's agent, paying one commission only on the charter, not exceeding 5*l*. per cent.," and where the bills of lading comprise the whole of the cargo, and pass into the hands

(a) 5 Best & Smith, 20.

of a single person, then, by universal custom, the holder of these bills of lading, although not the formal assignee of the charter-party, deducts the address commission from the freight. The defendants gave no evidence to the contrary; but as this is an important question, and as it may be a matter of some delicacy to distinguish between a custom that ordinarily prevails upon a friendly settlement of freight and a custom of so universal a character that it may be enforced *in invitum*, I shall refer this question to the Registrar and Merchants. I shall also refer to them to ascertain the rate of interest that should be allowed on the advances.

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I now resume the history of the voyage, chiefly to lead up to the claim made by the plaintiff in respect of that part of his goods which was jettisoned at sea, and that part which was sold at the Mauritius.

On the 19th of March, 1863, the Norway left Hastings, six or seven miles below Rangoon, with her cargo on board, drawing twenty-five feet, in charge of a pilot provided by Captain Brooking at the master's instance, and in company with a small steamer of sixty-horse power. The Norway was not towed down, the steamer not being powerful enough for that purpose; she was let drop down the river at ebb tide, stern foremost, the steamer being made fast to her alongside for the purpose of sheering or canting her so as to keep her in the stream or of giving her a stern-board. At night, and also during flood-tide in the daytime, she anchored. On the 23rd of March she took the sands; what circumstances occasioned this, the log-book does not state; and the master and the mate depose that, as the ship was at the time in charge of the pilot, and navigated by him exclusively, they know no more than that it was about ten o'clock when she was aground, that the weather was clear, and that there was a powerful tide running eight or nine knots an hour, for the freshets, so deposes the master, were commencing. Under these circumstances, it has been urged on behalf of the defendants, that the grounding is to be attributed to the perils of the seas; but against this must be set the very strong evidence of the experienced witnesses called by the plaintiff. They are Captain Ward, of the Indian navy, who himself made the survey of the Irawaddy for the Admiralty, Captain Dicey, who has commanded a government transport from Calcutta to Rangoon for thirteen or fourteen years, and a Mr. Duncan, who for ten years has been in charge of a sailing transport in the Irawaddy and the adjacent seas. According to them, the freshets do not commence before the rainy season in May, and even then the velocity of the tide would be seven knots an

The circumstances of the grounding in the Rangoon river show that it was caused by the negligence of the pilot, the defendant's servant;

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hour instead of eight or nine as deposed by the master. In March the ebb tide would be only four and a-half knots per hour, and, what is far more important, below Hastings, all the way to the sea, there is a clear channel, a mile wide, for vessels drawing thirty feet of water. Neither steam-tug nor pilot is necessary, though the use of both may be convenient and proper; and they assert that a master of ordinary skill, and with ordinary prudence, and watching the tides, could have safely navigated the Norway, loaded as she was, from Hastings to the sea. This evidence seems incontrovertible, and clearly to lead to the conclusion that the grounding of the Norway was caused by the negligence or want of skill of the pilot in charge. The pilot must have navigated the Norway either at a wrong time of the tide or out of her proper channel. Whether the master is liable for the negligence of the pilot is a legal question, which for the present may be reserved.

The Norway was got off the sands after a few hours. The Burmah Company procured the use of the mail steamer, 180 horse power, and by her assistance the Norway got clear out to sea, apparently uninjured. A few days afterwards the vessel began to leak, the leakage being clearly attributable, in the opinion of both the master and mate, to injuries received on the sand; the leak increased in spite of all efforts to stop it. On two occasions the master made jettison of the cargo not under the pressure of any immediate danger; but, in order to clear the side-ports, so that if, as was feared, the leak should increase suddenly, jettison might be made freely and rapidly. This jettison, it may be assumed, was not an imprudent or improper measure. It seems, however, to have been made in haste, the bags were not counted as they were thrown over; and the number thrown over was at first supposed to amount to 800, but turned out to be 500 only. The leak still increased, and the master found himself obliged to make for Mauritius. He reached Port Louis on the 11th of May, 1863. On the 12th of May the master noted his protest, and had it duly extended. The ship was then surveyed, and the certificate recommended cargo to be discharged. This advice was followed, but after 3,400 bags had been discharged, an accident happened to the machinery, which prevented the men from working the pump any more by steam, and the water in consequence was insufficiently kept under during the discharge of the remainder of the cargo, and fresh injury was done to the cargo. The cargo discharged, there were three other surveys made successively of the ship. One certified that the cargo had been well stowed and amply dunnaged. Another specified the repairs

that were requisite for the ship, and the last certified that these repairs had been properly executed. Besides these surveys on the ship, there were surveys of the cargo, the first by Borthfield, a broker, and then again by two sworn brokers. The result was, that 1,360 bags of damaged rice were sold. Then the master, being in want of funds, raised 7,200*l.* by a bottomry bond on the ship, freight and cargo. The ship repaired and the cargo reloaded, the master set sail again for England.

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Under these circumstances the plaintiff, in his petition, charges the master with having wrongfully thrown overboard part of his cargo, and with having wrongfully sold other part. The defence is, that the jettison and sale were in consequence of the perils of the sea, and that by the provisions of the bill of lading the shipowner was expressly exempted from all responsibility on this account. But do the facts sustain the defence? I have already held, upon a consideration of the evidence in a former part of this judgment, that the grounding of the Norway on the shoal is to be attributed to the negligence or want of skill of the pilot in charge of her, the master having wholly abandoned the care of her; and it is admitted by the master and mate, that the leak, which was afterwards found in her, was the consequence of this grounding, and not of bad weather. If so, then, though the jettison may have been necessary to avoid perils of the sea, and though the sale was confined to such part of the cargo as was found to be damaged when the whole of the cargo had been discharged at the Mauritius for the purpose of repairing the ship, then both the jettison and the sale were really the consequences of the neglect of the pilot, and in accordance with the cases of *Davis v. Garrett* (a); *Siordet v. Hall* (b); *Lloyd v. The General Iron Screw Collier Company* (c), and many other authorities, the person who is answerable for the negligence of the pilot is answerable for the consequences of that negligence. I think the shipowner, and therefore, in this case, under the provisions of the statute, the ship is answerable for the negligence of the pilot on this occasion. The pilot was employed by the authority of the master, he was not taken by compulsion of law. In cases of collision the shipowner is always responsible for the conduct of the pilot to whom he has voluntarily committed the charge of the vessel, and I can discover no sound reason why the same principle should not be applied, as between the shipowner and the owner of goods damaged or lost by default of a pilot not taken under compulsion.

and the ship is therefore responsible for the loss of cargo jettisoned and sold in consequence of such grounding.

(a) 4 Moore & Payne, 540.

(c) 3 H. & C. 284.

(b) 4 Bing. 607.

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The measure of damages is the nett value of the goods at the time and place of delivery.

In each case, the loss arises from the fault of the agent of the master.

The plaintiff, therefore, is entitled to an indemnity from the defendants for his goods, which, in the eye of the law, the defendants have wrongfully thrown overboard and wrongfully sold. An indemnity: What is an indemnity, and in what form is it to be made? Indemnity to the plaintiff clearly consists in recouping to him the loss which he has suffered in consequence of his goods having been thrown overboard and sold, instead of having been duly delivered to him; and that loss as clearly amounts to the value of the goods in a sound state at the time and place of delivery, less the freight payable on account of the same goods and necessary charges: this, for shortness, I may call the nett value. How then is this indemnity to be effected? There are three modes which may be considered:—1st. For the plaintiff to deduct from the full freight his full loss, viz., the nett value. 2. For the plaintiff to deduct nothing; but first to pay the full freight, and then to recover by action his full loss, viz., the nett value. 3. For the plaintiff to deduct from the full freight the freight of the goods thrown overboard and sold, and then by action to recover the residue of his loss. In the end, if all the parties are solvent, each of these modes comes to the same thing; but it is important to distinguish them, in order that the shipper may be able to ascertain the amount of freight for which the shipowner has a lien, and which he, the shipper, is bound to tender before he can become entitled to claim delivery of the rest of his goods brought to their destination. Now the first of these modes, by which the shipper would deduct the nett value from the full freight, is not recognized by English law. The cases of *Meyer v. Dresser* (a), *Dakin v. Oxley*, (b), and the *Salacia*, decide that under no circumstances can the shipper insist upon deducting from the full freight the value of his goods wrongfully disposed of during the voyage; he must seek his remedy for that value, as distinct from the freight, by cross-action. The third of these modes, by which the shipper would make a deduction from the full freight of the freight of the goods improperly disposed of, but no other deduction, is permitted to the shipper if the freight is payable *per tale*. [The *Salacia* and other cases.] But in this case the freight is lump freight; for I cannot accede to the argument that the freight is freight *per tale* because 11,250*l.* freight for 3,000 tons would be equivalent to the round sum of 3*l.* 15*s.* per ton, and 11,625*l.* for 3,000 tons to another round

The value of the goods lost through the shipowner's negligence cannot be deducted from the freight; but a proportion of freight in respect of such goods may be so deducted, notwithstanding the freight is lump freight.

(a) 16 C. B., N. S. 646.

(b) 15 C. B., N. S. 646.

(c) Lushington, p. 578.

sum per ton. This argument, besides being inherently weak, is based upon the assumption (which I have already declared to be without foundation) that the master covenanted absolutely to ship 3,000 tons. The freight is lump freight; and it is urged on behalf of the defendants that lump freight cannot be apportioned; that deductions would be difficult, if not impossible, to calculate; and consequently, that the only remedy open to the shipper is that of an action for damages.

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On the other hand, Mr. Lush argued for the plaintiff that if there was any difference between lump freight and freight *per tale*, it was that in the case of lump freight, if any part of the cargo shipped was not brought to the port of destination, the shipowner, in an action for freight, could not recover any freight at all, because he would not have observed his own part of the covenant; and in favour of this proposition Mr. Lush cited the old case of *Bright v. Cowper* (c). There seems to have been no recent decision on the point; and on consulting the various text books on the subject, I find they all speak doubtfully as to what would be decided if a case like the present should arise: Mac-lachlan, p. 396-7; Abbott, 340; Parsons, i., 245, 246, n.; Smith's Merc. Law, 317. The Court, then, must fall back upon considerations of equity. It certainly would be unjust that the master should forfeit the whole of his freight for failing to bring a small portion of his cargo; but, on the other hand, it would be harsh upon the shipper that he should in the first instance pay full freight, though his full cargo had not been delivered; nor, in ascertaining the proper amount of freight to be deducted, would any such difficulty be likely to arise as would detain the master and vessel in port. The Court, therefore, will hold that in the present case the plaintiff would have been entitled to deduct from the lump freight a sum equivalent to the freight for the goods jettisoned and sold, and then to have recovered the residue of his loss by a separate action. I have discussed this question specially as throwing light upon what would have constituted a sufficient tender on the part of the plaintiff to the defendant. So far as the claim in this petition for damages on account of the goods thrown overboard and sold is concerned, it is sufficient to decide that the plaintiff is entitled to recover the value of the goods in sound condition at the time and place of delivery, less the freight which would have been payable on them if delivered, and less also any necessary charges. The exact sum will be ascertained by the Registrar and Merchants.

I now come to consider the proceedings at Liverpool.

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[The learned judge then stated the evidence respecting the negotiation between the parties concerning the payment of freight and the delivery of the cargo, which took place between the 19th November, the date of the ship's arrival at Liverpool, and the 17th December, the date of the institution of the cause.]

On reviewing these negotiations the sum of them seems to be this:—There was a dispute as to the amount of freight due; the plaintiff offered to pay the undisputed portion at once, and to deposit the disputed portion with a bank, to abide a reference; the master, on the other hand, enforced his lien for the whole of the sum claimed; for, without going the length of refusing to deliver any part of the cargo until the whole of the sum claimed had been paid, he insisted on retaining in his possession sufficient of the plaintiff's goods to cover his full demand; he never relaxed his lien for 7,740*l.* 2*s.* 2*d.*

The master waived any tender of the money due from the cargo as freight and general average:

1st. By demanding an excessive sum in such a manner as to dispense with any offer of a smaller sum;

The defendants now question the right of the plaintiff to sue for damages with respect to the goods brought to Liverpool, and they do so upon the ground that the plaintiff was never entitled to delivery, for that he never made a sufficient tender, or a tender at all. The plaintiff, on the other hand, contends that the conduct of the master exempted the plaintiff from the obligation of making a tender. This conduct of the master is alleged to have consisted—1st, in making an unjustifiable demand, and insisting upon it throughout; and, secondly, in withholding papers and necessary information. As to the first point, the owner of goods may not be able to excuse himself for not having made a proper tender by merely showing that the master made an exorbitant demand; but it is a very different case when the master not only makes an exorbitant demand, but persists in it, refusing to listen to any proposition to take less. I think that the case of *Kerford v. Mondel (a)* is an authority for the position that the owner of the goods is not, in such a state of circumstances, bound to make a tender; and I also think that the necessary facts are proved to bring this case within the rule. The master did make an exorbitant demand, for the freight note which he delivered on the 8th of December, as will hereafter be stated, showing that 7,740*l.* 2*s.* 2*d.* was due, allowed no deduction of freight forfeited for breach of guarantee, or of freight for goods jettisoned and sold; he did insist upon this demand, and from first to last rejected the idea of compromise.

2ndly. By withholding from the plaintiff the papers

Now, then, as to the second point—it was strongly urged on behalf of the defendants that it was no part of the master's duty or contract to furnish the plaintiff with information or papers,

(a) 28 L. J., Exch. 303.

but to this doctrine the Court cannot accede. Where a creditor has a lien upon a debtor's goods for an unliquidated amount, that amount being dependent upon a complicated account, the particulars of which are, at all events, partly in the possession of the creditor alone, it seems only common sense that the creditor cannot be justified in enforcing his demand unless he has communicated to the debtor full information; and by full information I mean not merely the statement of the total amount claimed, but a detailed account, and a production of all papers in his possession necessary to enable the debtor to verify the account, and satisfy himself that the sum claimed is justly due. I see no reason why this rule should not apply to a master of a vessel in his relation to the owner of goods on board the vessel; nor do I think that in the present case this duty was the less incumbent upon the master of the *Norway*, because Ashburner, as representative of his firm, was aware of some of the advances which had been made to the shipowners, and which were to be deducted from the freight. That was an accidental circumstance. Besides, the particulars of which Ashburner was in possession were neither complete nor undisputed. If, therefore, the master failed to furnish to the plaintiff the papers necessary to enable him to ascertain the extent of the defendants' lien, and damage arose to the plaintiff thereupon, I shall hold that the master was guilty of a breach of duty within the terms of the sixth section of the Admiralty Court Act, 1861; and, also, that in consequence the plaintiff cannot be prejudiced in this cause from not having made a sufficient tender; for how could he make a sufficient tender if he had not the means of knowing what was a sufficient tender? To use the words of Lord Denman, in the case of *Ashmole v. Wainwright* (a),—"It is said that he (the plaintiff who was the owner of the goods) ought to have tendered the proper charges: the answer is, that they (the defendants who were the carriers) ought to have told him the proper charges." To turn then to the facts. What were the necessary papers, and were they duly furnished? The defendants had a lien for the amount of their freight and of the contribution of the cargo to general average, if any. In order, therefore, to fulfil his duty of furnishing complete information, the master should have delivered to the plaintiff the following amongst other papers:—

1. A *pro formâ* freight account, showing all the deductions from the lump freight, and the sum total claimed.

(a) 2 Q. B. 845.

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in his possession necessary to calculate the amount;

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- 2. Some memorandum from an average adjuster as to the probable amount of contribution from the cargo for general average.
- 3. The particulars of the tonnage shipped at the rice port; the particulars of the jettison; the surveys on the cargo at the Mauritius; and the account sales at Mauritius.

For, as I have already held, the plaintiff had a right to deduct from the full freight the freight forfeited in consequence of the breach of the guarantee, and also the freight for the goods jettisoned and sold.

Now a *pro formâ* freight account and a statement of a specified sum claimed for contribution to general average were, after repeated applications, delivered by Taylor, the master's agent, to Bushby, the plaintiff's agent, on the 8th of December, in the following form :—

“NORWAY.

“ESTIMATED FREIGHT ACCOUNT.

	£	s.	d.	£	s.	d.
“Freight per charter . . .				11,250	0	0
“Advance in Liverpool. . .	2,000	0	0			
“Ditto at Bombay, say R. }	1,108	6	8			
“10,747 7 7 @ 2s. 0½d. ex. }						
“Ditto at Rangoon, say R. }	1,151	11	2			
“10,918 7 11 @ 2s. 1½d. ex. }						
“Insurance £200						
“Interest . . 50	250	0	0	4,509	17	10
				£6,740	2	2

“Taking the value of the cargo at 10,000*l.*, a little over 1,000*l.* will cover average.”

On this document I will make two observations :—First, that so far as it relates to the claim for general average, it contains no particulars, nor is it authenticated by an average adjuster. Secondly, that I am satisfied that this was the only freight account, and the only specified claim for general average ever delivered to the plaintiff.

Then as to the other papers. No account of the jettison or of the sale, and no statement of general average, was ever sent to De Mattos or to the plaintiff. The master, after deposing in his examination that he is not positive whether, at the interview with the plaintiff on the 28th November, he had with him the papers respecting the jettison and the sale at Mauritius, in his cross-examination swears that he did have them all with him, and

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produced them to the plaintiff, and said that all were at his service. There is, however, great conflict of testimony on this point; and in such cases the only course, after considering the probabilities of the case, is to determine on whom lies the *onus probandi*; and if the party on whom the *onus* lies leaves the case in doubt, the decision must then, as I think, be against that party. In this case I deem it clear, that the burden of proof lies upon the master to produce or account for the non-production of the papers; and the only result at which the Court can arrive is, that it is not established to the satisfaction of the Court that the master fulfilled his duty by producing the requisite information.

On these two grounds then, viz.:—First, that the master, having made an exorbitant demand for freight, persisted in it, and refused to entertain the idea of reduction; and, secondly, that he withheld from the plaintiff the papers necessary to show what was the amount of freight and general average due;—I shall hold that the plaintiff, if he did not make a sufficient legal tender, was not thereby disqualified from prosecuting his claim for damages against the master for non-delivery of his cargo.

and the plaintiff is therefore entitled to damages for the non-delivery of his cargo.

This brings me to the claim of the plaintiff with respect to the disposal of his goods after their arrival in Liverpool. On the 7th of December, Bushby, the plaintiff's agent at Liverpool, at the end of a letter to Taylor, the master's agent, says, "Haul the ship into Stanley Dock, we paying the expense of moving her." On the 8th, Taylor resolved to discharge her in the Canada Dock; entered at first only a third of the cargo in the name of the owner of the ship, and hired warehouses. On the 10th of December, Mr. Bateson, the plaintiff's attorney, sent to both the master and Taylor the notices protesting against the master taking charge of the cargo, announcing that Bushby & Co. were ready and willing to take delivery as customary, and that the plaintiff would hold the master and the ship, and Messrs. Taylor & Co., as master porters, liable for all loss sustained by reason of the cargo not being properly sampled, marked and classified on landing. The same letter contained the offer of 3,100*l*. Notwithstanding this, Messrs. Taylor & Co. commenced the discharge of the cargo in the Canada Dock upon the 17th.

The Canada is an open dock. Formerly there were none but open docks; but within the last few years closed docks have been erected by the Mersey Harbour Board, especially suitable for grain cargoes, fitted with warehouses, and conducted by experienced sorters in the service of the Board. Rangoon rice, it appears, is generally discharged into these closed docks; and cargoes discharged there have some favour in the market from

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the confidence placed by the purchasers in the skill of the servants of the Board. But many grain cargoes are also discharged into the open docks; and if there are proper sheds attached to the dock, and if skilled servants are employed, there would seem to be no reason why the cargo could not be as well discharged and assorted as in the closed docks, the only difference being, that in the open docks the assortment is done by master porters, chosen by the consignee of the cargo, and in the closed docks this is done by the servants of the Board, and at a rather higher rate of charges. The process of assortment is as follows:—As the cargo is landed, distinction is made between the qualities, viz., first-class sound, then first-class damage, second-class damage, &c.; every fifth bag of each class is numbered, and each draft of five bags is weighed; the consequence is, that the purchaser, without further examination, knows what quality he is buying, and that the cargo can be sold at the landing-weights, without the necessity of re-weighing. The Canada Dock has a convenient shed attached to it. The cargo having been entered, and in the master's name, the master, by the authority of Mr. Alexander Taylor, appointed Mr. Joseph Taylor, member of the firm and licensed master porter, as the master porter to superintend the discharge of the cargo.

The cargo was landed by Mr. Joseph Taylor, and placed by him in certain private warehouses. It has, as I have previously stated, been since given up to the plaintiff and sold by him. It was sold at the recommendation of surveyors, "subject to all faults." It realized the nett sum of 20,020*l.* 16*s.* 3*d.* The market price of rice, it should be observed, had not fallen since the ship's arrival.

The plaintiff now seeks to recover damages from the defendants on three grounds:—

1. For not discharging into one of the three closed docks—Stanley, Wapping, or Albert.
2. For improperly handling the cargo, in not separating the damaged rice from the sound.
3. For non-assortment of the cargo.

The master was not bound to discharge in any particular dock named by the merchant, and was justified in discharging the rice on any wharf in which

As to the first of these heads, Mr. Lush cited the third paragraph of the sixty-seventh section of the Merchant Shipping Amendment Act, 1862, which directs that "if any wharf or warehouse is named in the charter-party or bill of lading, the shipowner shall land the goods at that wharf or warehouse;" and he argued, that the bill of lading, in stating that the Norway was "bound to Cowes for orders as per charter-party," rendered it incumbent

upon the master to obey the orders of De Mattos, the charterer, to discharge the cargo at the Albert, Stanley, or Wapping Docks; but on reference to the charter, it appears that the orders there mentioned were orders to proceed to London, Liverpool, Bordeaux, &c.; that is to say, to specified ports, but not to any particular dock in one of those ports. This argument, I think, therefore, cannot be maintained. Reference was also made by Mr. Lush to the fourth paragraph of the same section of the same Act, which provides that "the shipowner, in landing goods in virtue of this enactment, shall place them in or on some wharf or warehouse, on or in which goods of a like nature are usually placed;" and it was contended that the wharf in the Canada Dock was not a wharf on which Rangoon rice was usually placed. I think, however, that the evidence before me shows that rice is not unfrequently landed in the open as well as in the closed docks. Mr. Lush then argued that, irrespective of any obligation by express contract or by statute, the master being bound to deliver to the owner of the goods, was bound to deliver at the dock named by that owner. On this point I think the law is correctly represented in the following observation of Mr. Parsons, in his work on Maritime Law (vol. i., page 152):—

"The general rule applicable to carriers and other persons contracting to deliver goods, is that a personal delivery is necessary. But this rule does not apply to the case of ships, the usages of trade having constituted a delivery on the wharf, with notice to the consignee, sufficient." (See *Hyde v. Trent and Mersey Navigation Company* (a); and *Gatliffe v. Bourne* (b).)

The Court would be reluctant in any way to diminish the responsibility of masters of vessels to attend to the instructions given to them by the owners of the goods on board their vessels; but, in the present case, looking to the absence of any provision in the bill of lading that the goods should be delivered in any particular dock, to the difficulty and even danger of taking the Norway into the Stanley or Wapping Dock, to the attempt of the master to take her into the Stanley Dock; and, lastly, to the fact that the goods might have been as well landed in the Canada Dock as in one of the closed docks, I shall hold that the plaintiff is not entitled to any damages for the discharge of the cargo in the Canada Dock.

As to the second point, the claim to damages for not separating the non-sound from the sound rice, in the conflict of testi-

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"goods of a like nature are usually placed."

(a) 5 Term Rep. 389.

(b) 4 Bing. N. C. 314; 7 M. & Gr. 850.

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The master, detaining the cargo wrongfully, and landing it himself, was bound to assort it on landing, according to custom, and the ship is liable for the damages caused by the non-assortment.

mony I must hold that the plaintiff has failed to prove that in this respect the cargo was improperly handled.

As to the third point, the claim for damages for non-assortment, that the cargo was not assorted, and that hereby its sale was prejudiced, is admitted. The question is, whether the defendants were bound to assort.

Mr. Brett relied upon two statutes as constituting a valid defence. He cited the 35th section of the Mersey Dock Consolidation Act, 1858 (21 & 22 Vict. c. xcii.): "The cargo of any vessel from any foreign or colonial port entering and using any open docks shall be received, weighed, and loaded off by one set of porters only, who shall be in the employ and under the directions and orders of one of the master porters appointed by the Board," as showing that the duty of the master porter was limited to receiving, weighing, and loading off (which, in this case, was done), and that he is not bound to assort unless specially required and paid extra for the work, and the evidence of Messrs. Taylor went to the same effect. Mr. Brett also cited the 67th section of the Merchant Shipping Act Amendment Act, 1862. "If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment, and the expense of and consequent on such landing and assortment shall be borne by the shipowner." And his argument was, that entry by the owner of the goods and an offer to take delivery and to carry the goods to some other warehouse was a condition precedent to assortment, and that in this case the owner had not made entry, and therefore that the duty to assort did not arise. It is true, as a fact, Ashburner did not make entry; but, in my mind, the evidence establishes that this was occasioned by the wrongful act of the master. The master enforced his lien, and at the same time withheld the papers necessary to enable the plaintiff to ascertain what was a sufficient tender. This being so, I must hold that the plaintiff having been wrongfully prevented by the master from making entry must, as regards the defendant, be in as good a position as if he actually had made entry. The master had received express notice from the plaintiff to have the rice assorted; and, irrespective of that, he was bound to take as good care of the cargo as a prudent owner would have taken; and it appears in evidence it is the custom to assort Rangoon rice, and that the cargo was depre-

ciated by not having been assorted. I think, therefore, the plaintiff is entitled to damages for the non-assortment of his cargo.

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Then Mr. Brett contended that, even if the assortment of the cargo had been improperly omitted, the remedy of the owner of the goods would be against the master porter personally, and not against the shipowner. No doubt this would usually be the case, because usually the master porter is employed by the consignee of the cargo; but, in the present instance, the master porter was employed by the master of the vessel, and therefore the defendants would be liable to the plaintiff for the default of the master porter in respect of the plaintiff's goods. I hold that the defendants were bound to have assorted the cargo, and that whether the non-assortment arose from their neglect to give the proper order, or from the neglect of their agent in not making the assortment, they, the defendants, are equally responsible. The amount of the damage thus caused will be estimated by the Registrar and Merchants.

I have now only to state the conclusion. I think it will be convenient that I should sum up the results of this judgment. I shall endeavour to effect, as far as lies in my power, an adjustment of all outstanding claims between the parties.

Summary of judgment.

On the one hand, I shall hold that the master had a lien upon the cargo for freight and general average, if any. That the freight will be the sum contracted for by the charter-party, 11,250*l.*, less the following deductions:

1. The advances.
2. Commissions (if any), interest, and insurance.
3. The proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draft of the vessel.
4. The proportion of freight that would have been payable in respect of the goods jettisoned, and the goods sold at Mauritius, if these goods had been brought to their destination.

I shall refer it to the Registrar and Merchants to take an account thereof, and to ascertain the nett freight due on the principles stated in my judgment, taking into consideration the amount which has been paid on account of freight by the plaintiff during the progress of the cause, and the period at which it was paid. I shall also refer it to the Registrar and Merchants to ascertain the amount (if any) due from the owners of the cargo in respect of general average.

On the other hand I shall hold that the plaintiff, under the

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1. The goods jettisoned.
2. The goods sold at the Mauritius.
3. The non-assortment of the cargo at Liverpool.
4. The loss of interest occasioned by the wrongful withholding of the cargo.

I shall direct the Registrar, with the assistance of the Merchants, to assess these damages, and having done so, to take an account between the parties, and to ascertain the balance due, and to which of them.

They will also report to the Court, whether any, and if so what, interest is properly due on this balance, and for what period.

The plaintiff is entitled to his costs.

THE NORWAY.

In the Privy Council.

Present—LORD JUSTICE KNIGHT BRUCE.

SIR JOHN TAYLOR COLERIDGE.

SIR EDWARD VAUGHAN WILLIAMS.

In an action upon the bill of lading against the shipowner for loss of part cargo alleged to have been jettisoned and sold in consequence of the ship stranding, the plaintiff is not entitled to recover, unless he proves affirmatively that the stranding was occasioned by the negligent navigation of the ship :

Held, upon the evidence, reversing the judgment of the Admiralty Court, that this burden of proof was not satisfied, and that the loss was by perils of the seas.

The loss of part cargo having been occasioned by perils of the seas, *Held*, that under the bills of lading and charter-party the master's lien on the residue for freight extended to the entire lump freight without deduction.

Quære, whether, assuming the loss to have been by the shipowner's negligence, the Court of Admiralty was right in allowing a deduction from the lump freight of a proportionate sum representing the freight of the part not delivered.

Construction put by the Court of Admiralty upon the master's guarantee "to carry 3,000 tons, &c." affirmed.

The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender from the debtor of the sum really due ; but if the demand of the larger sum be so made that it amounts to an announcement that it is useless to tender any smaller sum :—

Held, affirming the judgment of the Admiralty Court, that this dispenses with any tender, even if it appears that the debtor was unwilling to tender the amount really due.

Held also, upon the evidence, that the master of the ship thus waived any tender of the freight and general average, and wrongfully withheld the cargo.

Held, reversing the judgment of the Court of Admiralty, that, although the master wrongfully withheld the cargo, his duty did not go beyond its safe custody and protection, and that he was not bound to assort the rice on landing it.

Semble, that the plaintiff's claim for damages in non-assortment of the rice could not otherwise be enforced, because it accrued after the petition was filed.

A reference was ordered to the Registrar and Merchants to take an account between the parties, and to report (*inter alia*) whether the plaintiff as holder of the bills of lading was entitled to deduct from the lump freight the address commission mentioned in the charter, and whether such right was forfeited by the plaintiff's agent having refused to take charge of the ship at the port of discharge.

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FROM the foregoing judgment of the Admiralty Court, the defendants, the owners of the Norway, appealed. In their case for appeal, and in the argument, they admitted that the plaintiff was the person entitled to sue, but contended against all the other conclusions of law and fact in the judgment which were adverse to them. The plaintiff did not appeal, but supported the judgment. The following additional authorities were cited and discussed.

1. As to whether the loss of the cargo by the jettison and sale was to be attributed to the negligence of the shipowner: *Worms v. Storey* (a); *Laurie v. Douglas* (b).

2. As to the shipowner's lien for freight: *Black v. Rose* (c); *Bahia* (d); *Cargo ex Galam* (e).

3. As to the waiver of the tender: *Allen v. Smith* (f).

4. As to the right to give evidence of custom with respect to the address commission: *Meyer v. Dresser* (g); *Suse v. Pompe* (h).

5. As to the right of making deduction from lump freight of a sum as freight for goods not delivered: *Kent's Commentaries* (i); *Behn v. Burness* (k).

6. As to the master's duty to assort the cargo on landing: *Coggs v. Bernard* (l); *Somes v. British Empire Shipping Company* (m); *Scarfe v. Morgan* (n).

On the 20th July, Sir EDWARD VAUGHAN WILLIAMS delivered the judgment of the Committee.

This is an appeal from a judgment of the High Court of Admiralty in a suit instituted under the 6th section of the

(a) 11 Exch. 427.

(b) 15 M. & W. 746.

(c) 2 Moore, P. C., N. S. 277.

(d) Ante, p. 292.

(e) Ante, p. 167.

(f) 12 C. B., N. S. 638.

(g) 16 C. B., N. S. 646.

(h) 8 C. B., N. S. 538.

(i) 10th ed., vol. 3, p. 316.

(k) 3 Best & Smith, 751.

(l) 1 Smith's Leading Cases, p. 171.

(m) E. B. & E. 353, 367.

(n) 4 M. & W. 284.

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Admiralty Court Act 1861, 24 Vict. c. 10, by which it is enacted that "the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of, the owner, master, or crew of the ship, unless it be shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The plaintiff sued, under this section, as the assignee of bills of lading. The defendants are the owners of the *Norway*, an American vessel; and plaintiff's petition complained (*inter alia*) that the master of the *Norway* wrongfully threw overboard part of the rice comprised in the bills of lading, and wrongfully sold a further part of the rice at the Mauritius. And, further, that on the arrival of the ship at Liverpool the master wrongfully demanded to be paid 6,500*l.* as freight, and an additional sum of 1,000*l.* by way of general average contribution, as a condition precedent to the delivery of any part of the cargo, and refused to deliver the cargo on any other terms. The petition contains other complaints as to the master of the *Norway* refusing to discharge at the docks at which he was directed to discharge, and also as to improperly dealing with the cargo in other respects, after arrival in Liverpool. But it is unnecessary to do more than state that the petition contained such complaints; because the Judge of the Admiralty Court decided that they were ill-founded, and the plaintiff has not appealed from that decision.

The defendants' answer denies many of the allegations of the petition, and justifies the jettison and sale of portions of the rice on the ground that it became, by reason of the perils of the seas, necessary and proper for the preservation of the ship and cargo to throw part of the rice overboard, and to sell another part which had been greatly damaged by salt water. To this part of the answer the plaintiff replies merely by denying the averments contained in it. The answer concludes by praying that the Judge will dismiss the petition with costs, and will decree that the plaintiff should pay to the defendants the balance of freight and general average due to the defendants, and interest thereon.

The learned Judge below, in a most elaborate, lucid, and able judgment, has gone through all the points arising in the cause which ought to decide the claims of the parties. And we think we cannot do better than to follow his judgment, and state in what respects we agree with and in what respects we differ from him.

The first question is, what is the meaning of a guarantee in the charter-party that the vessel shall carry 3,000 tons dead weight upon a draft of twenty-six feet water? And the materiality of this question arises from this, that she could carry the specified quantity on the specified draft in salt water, and could not in fresh. Does the guarantee then apply to salt water only, or to water fresh as well as salt? We think it applies to water fresh as well as salt. We think the learned Judge below was right in inferring from the charter that, in settling the stipulations as to the capacity and draft of the ship, both parties contemplated that the cargo might be loaded in a river, and that the guarantee meant that the vessel should be capable of carrying 3,000 tons on a draft of twenty-six feet during the whole time of taking in, and until and after she reached the open sea.

The next question is, whether the jettison of a portion of the cargo, and the sale of the damaged portion of it, have been sufficiently shown to have been the consequence, legally speaking, of negligence or want of skill on the part of the pilot, for which the shipowner is responsible. It was objected, on the part of the defendants, that even supposing that the grounding of the Norway was properly attributable to the misconduct of the pilot, yet that the injury thereby sustained by the vessel was not either the *causa proxima* or *causa causans* of the jettison or sale, inasmuch as it appears that the leak thereby occasioned would not, in fact, have rendered the ship unseaworthy, but for the tempestuous weather, which occurred some time after the Norway had proceeded on her voyage; and, moreover, that the damage to the rice sold, which necessitated the sale of it, would not have happened but for an accident to the steam engine, which rendered it useless in working the pumps. It is, however, unnecessary, in the view we take of the case, to express any opinion as to this contention, because we have come to the conclusion that there was not sufficient evidence that the grounding of the vessel was occasioned by any misconduct on the part of the pilot. The evidence on which the learned Judge in the Court of Admiralty relied, as leading to the conclusion that the grounding was caused by negligence or want of skill in the pilot is merely, or mainly, the expression of the opinions of Captain Ward, Captain Dicey, and Mr. Duncan, that a pilot of ordinary skill and ordinary prudence might have safely navigated such a vessel to the sea. This testimony does not go further, in our opinion, than to show a reasonable possibility that the grounding may have been caused by want of skill or want of prudence on the part of the pilot. But there is no evidence given, and no suggestion made of any conduct of the pilot which amounted to such want of skill or of

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The guarantee to carry 3,000 tons "upon a draft of 26 feet water," applied to the water in the place of loading, whether fresh or salt.

The plaintiff was bound to prove affirmatively that the grounding of the ship was occasioned by default of the pilot; but, upon the evidence, he has failed to do so.

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care. The ship was of large size, and loaded as heavily as she could bear. It was necessary, under the circumstances, to let her drop down the river stern foremost, and a steamer of sixty-horse power, which was not powerful enough to tow her down, was made fast to her alongside for the purpose of sheering or canting her so as to keep her in the stream, and the grounding took place while the steamer was thus employed. The master and the mate were not asked whether there was any impropriety in thus navigating her. The witnesses on both sides agree that the tide ran very strong (although there is a conflict of testimony as to the amount of its velocity). No suggestion is made on the cross-examination of the master or the mate of anything done or omitted by the pilot which he ought not to have done or omitted, and the master swears that the steamer could not hold the ship against such a current, and that the navigation appeared to him very difficult in that current with so large a ship. And it seems to us impossible to affirm with reasonable certainty that such a vessel so navigated might not have grounded from some cause which reasonable skill and prudence on the part of the pilot could not prevent. The plaintiff was bound to prove affirmatively, and not merely by way of conjecture, that the vessel grounded by reason of the pilot's want of skill or want of care, and we can find no such proof in the evidence he has adduced. It may be added, that the silence of the petition as to any imputed negligence affords some ground for the defendants' complaint, that this imputation took them by surprise, so that they were not prepared with the evidence of the pilot.

The loss of part cargo having been by perils of the seas, there is no deduction from the lump freight of proportionate freight for part cargo not delivered; and *semble* there would be no such deduction if the loss had been by the shipowner's negligence; but the shipper's remedy would be a cross action.

The next question is, whether, in respect of the rice jettisoned and that which was sold, there ought to be a deduction from the lump freight because they were not delivered. We think that there ought to be no deduction. It is obvious that this question stands on a somewhat different footing from that on which it stood when it was decided by the learned Judge below, because it was then taken for granted that the jettison and sale, and consequent failure to bring home the goods, were owing to the misconduct of the master. But in the view we take of this part of the case it must be understood that they were owing to the perils of the sea, and that the master was free from blame in the matter. Although the lump sum is called "freight" in the charter and bills of lading, yet we think it is not properly so called, but that it is more properly a sum, in the nature of a rent, to be paid for the use and hire of the ship on the agreed voyages. The charter-party expresses that a sum of 11,250*l.* is to be paid as freight for the "use and hire of the ship," and this lump sum is to cover both the outward and homeward voyages, without

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any distinction as to how much of it is to be attributed to the outward and how much to the homeward voyage. If this be so, the shipper has had the full consideration for the money agreed to be paid. The ship took out the salt, and received the rice on board, and performed her homeward voyage according to her engagement, and the event that by the act of God it became impossible to carry to the port of destination the rice jettisoned and the rice sold ought not to affect the shipowner's right to receive the full amount of the stipulated payment. It was objected, on behalf of the respondent, that, by the charter-party, the remainder of the lump sum is made payable only on "true and final delivery of the cargo at the said port of discharge." But this does not necessarily mean that the whole cargo originally shipped must be delivered. It may well have been intended merely to fix the time for payment to be the time of the delivery of such cargo as the ship brings with her to the port of discharge. And it should be observed that the "one-third in cash" is made payable "on arrival at the port of delivery," without any reference to the cargo the ship shall bring with her. It is right to add, that we do not mean to express an opinion, that even if the jettison and sale had been attributable to the negligence of the master there ought to have been a deduction. Perhaps in this case the proper remedy of the shipper would have been by a cross action. But it is not necessary to decide this point which does not now arise.

The next question is, whether the plaintiff has a well-founded claim for damages against the defendants for the non-delivery of the cargo; and this depends on the question, whether the plaintiff was excused by the conduct of the master from making a tender of the freight for which the cargo was liable. We have felt considerable difficulty on this part of the case. It is clear that the master claimed more than was due to him. But it was conceded that this alone would not dispense with the tender. If, however, the demand of the larger sum was so made that it amounted to an announcement by the master that it was useless to tender any smaller sum, for that if tendered it would be refused, that would amount to a dispensation with any tender, generally speaking. And, in the present case, the Judge of the Court of Admiralty having come to the conclusion of fact, that the demand was made under such circumstances that it did amount to such an announcement, we see no reason for dissenting from the conclusion he has so drawn. But our difficulty is, that in this case there is positive evidence, in our opinion, that the plaintiff had resolved not to tender the amount unquestionably due; for his proposal was to pay a certain amount of the

The master demanded an excessive sum for freight and general average as the condition of delivering the cargo, and in such a manner that it amounted to an announcement that it would be useless to offer any smaller sum. This excused any tender from the plaintiff, notwithstanding that the evidence shows that he had resolved not to tender the sum rightfully due; and entitled him to damages for wrongful detention of the cargo.

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freight claimed, and to deposit the residue with a banker, as being a disputed portion. Now this residue was an amount to cover the whole of the alleged short delivery of 300 tons at Rangoon, where 2,700 tons had been shipped instead of 3,000 tons; whereas, the learned Judge below was of opinion that the plaintiff had no claim for deduction in respect of even so much as 100 tons, and against this part of the judgment there is no appeal. Consequently, it appears that the plaintiff meant that his tender of money to the master should not cover a portion of the claim which has turned out to be due. However, we are not prepared to hold that this varies the ordinary rule which we have stated as to dispensing with the tender altogether by announcing that it will be useless to tender anything less than the wrongfully large amount insisted on.

That the sum insisted upon in this case was wrongfully large we think is plain; for, without entering into the question whether the plaintiff was wrong in claiming the full lump sum, the claim of 1,000*l.* for general average was altogether unfounded, as will appear when the estimate on which this claim is based is narrowly examined.

The amounts which, according to the master's estimate, formed the subject of general average, were—

For expenses incurred by him at the Mauritius	..	£1,530
For loss on the cargo jettisoned and sold	.. ..	1,200
<hr/>		
Making a total loss, as the subject of general		
average, of	.. .. .	£2,730
<hr/>		

This amount had consequently to be apportioned between the ship, freight, and cargo. Then the master values the ship at 10,000*l.*, and the freight he takes at 7,000*l.* then due. The cargo he estimates at 10,000*l.*, which seems reasonable, for although the cargo sold for 20,000*l.*, yet deducting the freight and the landing charges and assorting charges, &c., the balance would probably not be much more than 10,000*l.* Assuming, therefore, the values to be correct, there is a total of 27,000*l.*, on which has to be apportioned the total of the losses forming the subject of general average, viz., 2,730*l.* By the rule of three this will give the proportions payable by the ship, freight, and cargo as follows:—

Ship	.. .. .	£1,011
Freight	.. .. .	708
Cargo	.. .. .	1,011
<hr/>		
Total	.. .. .	£2,730
<hr/>		

In other words, the owner of the ship, who is also the owner

of the freight, has to pay as his proportion towards general average :—

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For the ship	£1,011
For the freight	708
							<hr/>
							£1,719
							<hr/>

But his losses, which form the subject of general average, are only 1,530*l.*, so that the amount payable by the owner of the ship and freight as his contribution to general average, is the difference between these two sums, or 189*l.* On the other hand, the owner of the cargo has to pay as his proportion 1,011*l.*, but his losses have been 1,200*l.*, so that he has to receive 189*l.* to make up the losses on account of general average sustained by him.

The general average account would then be balanced by the owner of the ship paying to the owner of the cargo the sum of 189*l.* If this be so, then upon the master's own estimate of general average there was nothing due to him by the owner of the cargo on account of general average, but, on the contrary, he owed the owner of the cargo a sum of 189*l.* on this account.

Being then of opinion that the peremptory claim for general average brings the case within the rule as to dispensation with the tender, it is unnecessary to consider the other ground on which the Judge below came to the conclusion that the conduct of the master had exempted the plaintiff from the obligation of making a tender.

It remains to be considered whether the plaintiff has a right to deduct "address commission" from the freight. The contest in the Court below appears to have been confined to the question whether, by custom, the holder of a bill of lading comprising the whole of the cargo has a right to deduct the address commission from the freight, and the learned Judge referred this question to the registrar and merchants. But in the argument before us the contention was that, assuming the custom to be so, the address commission was never earned, inasmuch as Bushby & Co., to whom the ship was addressed as the agents of the shipper, refused to accept the ship as agents, and never acted for the ship at all; but that Taylor & Co. acted as agents of the ship for the defendants, who will have to pay them for so doing. Under these circumstances, we think the reference to the registrar and merchants ought to be enlarged by leaving it to them to inquire whether the plaintiff, by his agents, so acted on the ship's behalf as to entitle him to the address commission.

As to the address commission, the following questions to be referred to the registrar and merchants : (1.) Whether the holder of a bill of lading comprising the whole cargo, and making the freight payable as per charter, has a right to deduct the address commission from the freight; and if so, (2.) Whether such right was forfeited by the plaintiff by reason of his agent refusing to take charge of the ship at the port of discharge.

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Damages for non-assortment not to be allowed. The master was not bound to incur the expense of assorting the cargo in order to benefit it. His duty did not go beyond safe custody and protection from damage. *Semble* also, the claim could not be enforced by reason of its having accrued after the petition was filed.

The last question to be considered is, whether the claim for damages for non-assortment can be supported. An objection to this claim was taken on behalf of the appellants, that there is no mention of it in the petition. The answer made to this objection is that this cause of complaint did not arise till after the petition was filed; an answer by no means satisfactory. But upon the merits of this question we think the plaintiff fails. We do not understand why he did not avail himself of the power conferred by the statute 25 & 26 Vict. c. 63, s. 67, to enter and land the goods himself. If he does not, but allows the master to do so, is the master bound to take steps to have the goods assorted, if the owner of the goods requires him so to do? If the master were to give orders for it, he would, we apprehend, render himself liable for the expenses of the assortment. No doubt the law is that such a bailee is bound to take as good care of the cargo as a prudent owner would have taken; but we have never heard of any case where the bailee was held to be bound to incur a pecuniary liability to procure an advantage for the subject of the bailment. His duty, we think, does not go beyond safe custody and protection from injury or damage. We therefore think that this claim cannot be sustained.

Recapitulation.

According to our opinions on the various points arising in this case, the freight due to the owners of the Norway is the sum contracted for by the charter, less the following deductions:

1. The advances;
2. Address commission (if found in favour of the plaintiff by the registrar and merchants);
3. The proportion of freight forfeited for breach of the guarantee in the charter-party as to the capacity and draft of the vessel.

It should then be referred to the registrar and merchants to take an account and ascertain the nett payment due on the principles we have stated, taking into account the amount which has been paid on account of freight by the plaintiff during the progress of the cause.

On the other hand, in our opinion, the plaintiff, under the provisions of the Admiralty Court Act, 1861, is entitled to be indemnified for the loss of interest in respect of the wrongful withholding of the cargo, and to the claim for insurance and interest, but to nothing more.

Therefore the registrar, with the assistance of the merchants, will have to ascertain the balance due, and to report to the Court whether any interest, and if so what, is properly due on such balance; and we shall humbly recommend her Majesty that judgment shall be given for the balance and interest thus

ascertained. And that there shall be no costs on either side, either in the Court of Admiralty or here.

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Pritchard & Sons, proctors for the appellants.

J. F. Elmslie, solicitor for the respondent.

No costs allowed either in the Court below or on appeal.

Appended is the Schedule annexed to the REPORT OF THE REGISTRAR AND MERCHANTS. It will be seen that they allowed the plaintiff to deduct from the lump freight the address commission on the gross freight earned: and that they estimated the amount for which the defendants had had a lien for freight and general average at £6,114:19s. 4d., a sum exceeding, therefore, the plaintiff's estimate of £3,461:13s. 2d., and falling short of the defendants' demand of £7,740:2s. 2d. For the purpose of making the account clear, it may be convenient to repeat here that the 17th November, 1863, was the date of the ship's arrival in Liverpool; that the 1st April, 1864, was the date of the actual receipt by the plaintiff of the cargo, and by the defendants of the £3,461:13s. 2d. paid into Court, and that the sum of £20,020:16s. 3d. was the nett sum subsequently realized by the cargo, and that the market had not varied from the 8th December, on which date it was estimated the delivery and sale would in ordinary course have taken place.

SCHEDULE.

	£	s.	d.	£	s.	d.
1. Lump freight, as per charter-party				11250	0	0
Deduct						
2. Advanced on the sailing of the ship ..	2000	0	0			
3. Advanced in Calcutta per Custom's officers, Rs. 55, at 2s. 0½d., E. K... ..	5	11	8			
4. Advanced in Bombay—Rs. 10,747 7 7, at 2s. 0½d. ex.	1099	18	9			
5. Advanced in Rangoon—Rs. 10,918 7 11, at 2s. 1½d. ex.	1151	11	2			
6. Insurance as per policies of Empire Marine Company of Liverpool Lloyds on £2,450 at £5: 5s. per cent. sea risk	128	12	6			
7. Policy duty at 4s. per cent.	5	0	0			
8. Insurance as per policy in the Thames and Mersey Company on £2,450 at 3 per cent. war risk	73	10	0			
9. Policy duty at 4s. per cent.	5	0	0			
10. Proportion of freight forfeited for breach of guarantee in the charter-party as to the capacity and draft of the vessel—viz., 82 tons out of £3,000 at £3: 15s. per ton	307	10	0			
Carried forward ..	4776	14	1	11250	0	0

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	Brought forward ..	4776	14	1	11250	0	0
	11. Address commission on the gross freight earned, being the difference between the lump freight contracted for and the proportion of freight forfeited — viz., £10,942:10s. at 5 per cent., as per charter-party	547	2	6			
	12. Interest on the undermentioned sums at 5 per cent. per annum from 6 months after the advances were respectively made to the 17th November, 1863, the day of the vessel's arrival at Liverpool, namely,— (1) On £5:11s. 8d. from the 30th December, 1862	0	4	11			
	(2) On £1,099:18s. 9d., from the 20th June, 1863	22	12	0			
	(3) On £1,151:11s. 2d. from the 18th September, 1863	9	9	3			
					5356	2	9
	13. Balance of freight, of which one-third was to be paid in cash on arrival at port of delivery, and the remaining two-thirds on true and final delivery of the cargo, by bills at three months				5893	17	3
	14. Interest at 4 per cent. per annum on £1,959:9s. 11d., being one-third of the balance of freight from the 17th November, 1863, the date of the ship's arrival to the 1st April, 1864				29	4	1
	15. Interest at 4 per cent. per annum on £3,918:19s. 10d., being the remaining two-thirds of the balance of freight from the 8th March, 1864, being three months after the probable date of delivery of the cargo to the 1st April, 1864				10	6	0
	16. Amount due from cargo as contribution to general average after allowing for jettison and sale at Mauritius				221	2	1
	17. Interest thereon at 4 per cent. per annum from the 17th November, 1863, to the 1st April, 1864				3	5	10
	18. Balance due to the owners of the ship on account of freight and general average on the 1st April, 1864				6157	15	3
	Deduct						
	19. Interest on £20,020:16s. 3d., the nett proceeds of the sale of the cargo from 8th December, 1863, the probable date of the delivery of the cargo to 1st April, 1864, at 4 per cent.	250	2	5			
	20. Cash paid to the master in obedience to the order of the Admiralty Court	3461	13	2	3711	15	7
	21. Balance due to the owners of the "Norway" on a settlement of the whole account				£2445	19	8
	With interest thereon at 4 per cent. per annum from the 1st April, 1864, until paid.						

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March 3.

THE HELENE (a).

Suit for damage to Cargo—24 Vict. c. 10, s. 6—Pleading—Bill of Lading “Not accountable for Leakage”—Onus probandi—Negligence—Bills of Lading Act, 18 & 19 Vict. c. 111.

In a suit for damage to cargo under the 6th section of The Admiralty Court Act, 1861, the petition ought in general to state, so far as is practicable, the cause to which the plaintiff attributes the loss or damage.

Where a bill of lading for oil contains the ordinary exception of sea perils, and in the margin the memorandum, “Not accountable for leakage;” upon loss by extraordinary leakage being proved, the burden of proof is on the shipowner to show that he is not liable for such loss. Such extraordinary leakage having been proved to have taken place from a mode of stowage which was hazardous, and from no special precautions being used to obviate the hazard: *Held*, that the shipowners were liable.

The rights and liabilities which the assignee of a bill of lading under the 1st section of 18 & 19 Vict. c. 111 has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him. In these are not included the rights and liabilities as between the shipper and the master dehors of that contract in respect of other goods or of the charter-party.

The charter-party provided that the cargo should be taken alongside by the charterer, and be received and stowed by the master as presented for shipment, the charterer being allowed to appoint a head stevedore at the expense and responsibility of the master for proper stowage. The cargo was received and stowed accordingly, the whole being shipped by the charterer (who was on board during the loading, and made no objection to the mode of stowing). Amongst other goods, oil was shipped in casks, and rags and wool were stowed in the same hold over and near it, without any bulk-head being placed between. Bills of lading for the oil making no reference to the charter, and containing the memorandum, “Not accountable for leakage,” were assigned to merchants, purchasers of the oil, who had no notice of the charter. On the voyage extraordinary leakage in the oil took place from the wool and rags heating the oil casks, and causing them to shrink. The assignees sued on the bill of lading for the loss of the oil. Conflicting evidence was given as to whether the juxtaposition of wool and rags to oil in the same hold was known to be a dangerous mode of stowage.

Held, upon the evidence, that the mode of stowage was hazardous: and that the master taking the rags, wool and oil together, was bound to take extraordinary precautions to prevent mischief:

That the shippers might have sued the shipowner for the loss of the oil, notwithstanding the charter and the shipment thereunder:

That if the shippers could not maintain such an action because of the charter and the shipment thereunder, the assignees might nevertheless recover the loss as for a breach of the contract contained in the bill of lading.

THIS was an action instituted under the 6th section of the Admiralty Court Act, 1861, by Messrs. T. and H. Briscall & Co., to recover damages for short delivery of a cargo of olive oil.

(a) See same case on appeal, reported post, p. 429.

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The petition filed was as follows:—

1. The plaintiffs carry on business in Liverpool as oil merchants, under the name of T. and H. Briscall & Co.

2. The Helene is a foreign ship, and, at the time of the institution of this cause, no owner or part owner was domiciled in England or Wales.

3. On or about the 10th of August, 1864, 47 casks of olive oil were shipped on board the Helene, then lying in the port of Leghorn, in Italy, and bound for Liverpool. The master of the ship signed and gave, in respect of the said olive oil, a bill of lading in the following terms:—

ⓑ 1/47 “Shipped in good order and condition by Thomas Lloyd and Co., of Leghorn, in and upon the good ship or vessel called the Helene, whereof is master for this present voyage Bachofen, and now lying in the port of Leghorn, and bound for Liverpool, forty-seven casks olive oil, weighing kos. 19,943 ~~ne~~ being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of Liverpool, all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted, unto order or to assigns, he or they paying freight for the said goods 35s. sterling per ton of 252 imperial gallons, with ten per cent. primage, and average accustomed. In witness whereof the master or purser of the said ship or vessel hath affirmed to two bills of lading all of this tenor and date, one of which being accomplished, the rest to stand void.

The freight is to be paid nett in cash, without interest or discount.

“Dated in Leghorn this 10th day of August, 1864.

“Weight, measurement, and contents unknown, *and not accountable for leakage.*”

4. The said bill of lading was endorsed in blank by the shippers, and assigned to the plaintiffs, and at the time of the institution of this cause the plaintiffs were the owners of the said olive oil, and the assignees of the said bill of lading.

5. The Helene arrived at Liverpool on or about the 19th October last, and the said 47 casks were delivered to the plaintiffs, but many of the said casks were wholly or partially empty, showing a loss of 2,001½ gallons of oil, out of 4,888¾ or thereabouts. The said loss was not occasioned by the dangers or accidents of the seas or navigation, nor was the same leakage within the meaning of the bills of lading, but the said loss

was occasioned by the negligence of the defendants or their servants.

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6. The plaintiffs seek to recover all the damages occasioned to them by the said negligence, breach of contract, and breach of duty on the part of the defendants.

The solicitors for the plaintiffs pray the Right Honourable the Judge to pronounce for the said damages, and to condemn the said ship and the defendants in the same, and in the costs of this cause.

Notice of motion was now (28th November, 1864) given by the defendants for an order "that the plaintiffs do amend their petition by setting out the particulars of the alleged negligence, and also the particulars of the alleged breach of contract and breach of duty."

R. G. Williams, in support of the motion, referred to the practice at Common Law of requiring a plaintiff to give particulars in order to give due information to the defendant of the case he had to meet.

[*DR. LUSHINGTON* :—It is a question of great difficulty what extent of particulars the plaintiffs should give in a case of this kind. They may be without means of knowing the cause of the loss. They may only know that their cargo is lost. However, it is highly desirable that if they can they should specify the cause of loss on which they rely.]

Lushington, for the plaintiffs, offered to add the following paragraph to the petition :—

7. "One of the acts of negligence and breaches of contract and duty on the part of the defendants on which the plaintiffs will rely is, that the said oil was improperly stowed in this among other respects, that large quantities of rags and wool were stowed in the same hold with and near the said oil, whereby the said damage was occasioned wholly or in part."

The learned Judge then ordered the petition to be amended accordingly.

The answer to the petition as above amended denied the allegations in the petition, and pleaded that the loss of the oil

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was occasioned by the perils of the sea, and by the slackness of the casks in which the oil was shipped; and further, that the cargo was shipped in accordance with the terms of a certain charter-party (copy of which was annexed to the answer), and that the shippers of the oil who were the charterers saw how the oil was being stowed and made no complaint.

This charter-party, dated Leghorn, 16th July, 1864, was between the master of the vessel, and Messrs. T. Lloyd & Co., of Leghorn. The material provisions were as follows: "The ship shall load here in the customary manner a full and complete cargo of such lawful goods or merchandise as the charterers may require. The cargo to be taken alongside and from alongside the ship by the merchants at their own risk and expense, and to be received and stowed by the master as it may be presented for shipment, the charterers being allowed to appoint a head stevedore, at the expense and under the inspection and responsibility of the master for proper stowage. Bills of lading to be signed by the master, as customary, at the charterer's counting-house, and at whatever rate of freight they may require without prejudice to the present agreement."

The plaintiffs in their reply denied the various statements in the answer.

The cause came on for hearing in the Admiralty Court on the 27th January, 1865, when the following facts were proved:—

In June, 1864, Messrs. Lloyd & Co., of Leghorn, a firm largely engaged in the oil trade, offered to the plaintiffs, oil merchants at Liverpool, a quantity of oil, amounting to forty-seven casks, which the plaintiffs bought. The documents relating to the negotiation and sale, mode of payment of the price, and delivery to the carrier were not put in evidence: but the expression of one of the plaintiffs who was examined was, "We bought this oil." In July following, Messrs. Lloyd entered into the charter-party for the Prussian barque *Helene*, the material part of which is above set out. The plaintiffs had no notice of this charter. On board this vessel the charterers shipped (together with various other goods) the forty-seven casks of oil (which formed the subject of this action), for which the master signed bills of lading, as set out in the petition, making the oil deliverable in good order and condition "to shippers' order or assigns," subject to the usual perils, and the marginal condition, "not accountable for leakage." There was no evidence as to the manner in which the shippers dealt with this bill of lading (whether they forwarded it direct to the plaintiffs or in the first

instance to their own agent), except that at the time of action brought there were the following indorsements:—

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“Delivered to Messrs. T. H. Briscall & Co., p. Thomas Lloyd & Co.

T. LLOYD.

T. & H. Briscall & Co.”

In October the vessel reached Liverpool. The oil shipped under the bills of lading was 4,888 gallons; but the whole quantity actually delivered was 2,001 gallons only. It was proved, without contradictory evidence, that ordinary leakage in oil cargoes from the Mediterranean does not exceed one per cent. The plaintiffs gave evidence that the casks in which the oil was brought were good, and that the cause of the great leakage was that rags and wool had been stowed in the same hold with the oil over and near to it, and that heat had been generated by the rags and wool, which had caused the casks to open: also that such stowage, especially without particular measures for separation and ventilation (which had not been adopted) was unusual, and well known in the oil trade to be dangerous. The defendants gave evidence that the shippers had used ill-seasoned casks which slackened on the voyage: that the ship had met some bad weather, and that the leakage complained of ensued from these causes combined. They also proved that the entire cargo had been furnished by the charterers, and shipped in accordance with the charter, that is, taken on board as presented for shipment, and stowed by the stevedore appointed by the charterers, under the inspection of the master: also that the cargo was very carefully stowed, and that the shippers were very often down on board the ship, and saw how the cargo was stowed, and made no objection: also, that stowage of rags and wool with oil in the same ship was not unusual, and was not known to shipmasters generally or to the master of this ship in particular to be dangerous.

The first two sections of the Bills of Lading Act, 18 & 19 Vict. c. 111, are as follows:—

1. “Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. “Nothing herein contained shall prejudice or affect any

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right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement."

Brett, Q.C. (*Lushington* with him), for the plaintiffs. The evidence shows that the extraordinary loss of the oil was caused by the contiguity of the rags and wool. This was negligent stowage, for which the shipowner is responsible, under the contract contained in the bill of lading, notwithstanding the condition, "not accountable for leakage :"
Phillips v. Clark (a). The plaintiffs are the holders of a clean bill of lading, and have nothing to do with the charter which the shippers had made ; but, as between the master and the charterers, the master is under this charter responsible for the bad stowage of the stevedore. This case is manifestly different from *Blaikie v. Stenbridge* (b), where the clause was "Stevedore for outward cargo to be appointed by charterer, but to be paid by and to act under captain's orders."

Edward James, Q.C. (*Aspinall* and *R. G. Williams* with him), for the defendants. Upon the evidence the loss of the oil was not from the stowing but from the inadequacy of the casks. But if it arose from the stowing, the stowing was not negligent : to stow rags and wool with oil, was not a want of ordinary care on the part of the master. But at any rate in this case the stowing was with the assent of the shipper : the shipper was the plaintiffs' agent to ship ; or, if not, at any rate the plaintiffs are his assignees, and as such have under the statute 18 & 19 Vict. c. 111, no better or greater rights than he has.

Brett, Q.C., in reply. The bill of lading makes no reference to the charter-party, and the plaintiffs, as holders of the bills of lading, take neither burden nor benefit under the charter : *Foster v. Colby* (c) ; *Norway* (d). The shippers were not the agents of the plaintiffs to ship in any particular way : they chartered and loaded the ship for their own purposes. But the shippers, moreover, would have a remedy against the master for negligent stowage : *Hutchinson v. Guion* (e) ; or even for damage occasioned by stowage, though the master was not to blame : *Gillespie v. Thompson* (f).

(a) 2 C. B., N. S. 156.

(b) 6 C. B., N. S. 894.

(c) 3 H. & N. 705.

(d) Ante, p. 377.

(e) 5 C. B., N. S. 149, 162.

(f) 6 El. & Bl. 477, note.

DR. LUSHINGTON :—The plaintiffs, Messrs. Briscall, Oil Merchants at Liverpool, in June, 1864, purchased there a quantity of oil of the agent of Messrs. Lloyd & Co., of Leghorn, a firm largely engaged in the oil trade.

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Judgment.

In July following, Messrs. Lloyd chartered the Prussian barque, the Helene, to proceed to Liverpool, and they shipped on board her the oil purchased by the plaintiffs. In October, the vessel reached Liverpool. The oil shipped to be delivered to the plaintiffs was 4,888 gallons. The whole quantity actually delivered was less than that quantity by 2,000 gallons. The plaintiffs were the assignees of the bill of lading, and also the proprietors of the oil. For the deficiency they bring this action against the ship, in effect against the owners. The first question which arises is—What was the cause of this deficiency? And that question being decided, so far as the materials before the Court will enable it, the next question is—Assuming that the Court is right in its opinion as to the facts, whether upon such a given state of facts the plaintiffs are entitled to recover? As to the facts, it is a case of conflicting evidence, and therefore, as I apprehend, it behoves the Court to consider at every step on whom the onus probandi rests. The bill of lading is in the ordinary form. It states that the oil was shipped in good condition, that the master is to deliver it in the same good order and condition, save the dangers of the seas, and also that he (the master) is not accountable for leakage. If the master does not so deliver the oil, I apprehend that it lies upon him to allege and prove a legal excuse. He must prove the facts to exonerate him from his obligation to deliver, more especially if such facts, generally speaking, can be proved from the ship only.

The burden of proof is on the master to excuse the non-delivery.

It is proved in this case, and there is no contradictory evidence, that ordinary leakage does not exceed one per cent. The leakage in this case is therefore extraordinary leakage, and must be accounted for by some extraordinary cause. The plaintiffs allege that the oil was improperly stowed, and particularly that large quantities of rags and wool were stowed in the same hold, near the oil, whereby the damage was occasioned wholly or in part. The defendants allege that the leakage arose from the slackness of the casks, their defective state increasing by bad weather, and they aver that the cargo was well stowed. It is not denied that, independently of the mixing rags and wool with the oil casks, the cargo was well stowed.

The two principal questions of fact then for consideration are, first, the condition of the casks; and, second, the effect of stowing wool and rags in contiguity with, or in the immediate neighbourhood of, the casks of oil. If the casks were defective,

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it is not and cannot be contended that any loss arising from that cause should fall upon the shipowners; it is the fault of those who shipped the oil.

Now it is to be observed that, according to the bill of lading, the oil was shipped in good order and condition. So far, therefore, as was apparent, the casks must, I think, be assumed to have been in that state. The shipowner, however, cannot be responsible for secret defects, nor can he in his own defence be stopped from proving them. The non-discovery of secret defects cannot be negligence, nor can it be a part of the contract of the shipowner to protect the shipper from the consequences of his own defective merchandize.

I incline to think that the onus probandi upon this point of the condition of the casks is first upon the shipowner, who asserts the affirmative that the casks were defective. The Court has, I regret to say, to deal with very conflicting evidence, and that, too, as to simple facts between witnesses of respectability, and some of great experience. The true issue, however, it must be observed, is not whether the casks in question were the best possible casks, but whether they were of the usual and ordinary kind, of ordinary material, strength, and goodness. How this is to be ascertained is, I feel, a question of some difficulty. It is left in some doubt whether mere inspection of the casks would lead to a satisfactory conclusion, or whether nothing short of chipping the casks would enable an experienced person to form a judgment. There is no evidence as to the condition of the casks at Leghorn, except the assertion in the bill of lading; the evidence is all as to their condition on their arrival at Liverpool, which I will now proceed to state.

Upon a balance of the evidence, the casks were not defective.

[After stating the evidence in detail.] I am of opinion that it is not proved that these casks were of a defective quality, but, on the contrary, that they were of the usual character. I am satisfied that this conclusion is correct upon the evidence I have examined, and that it cannot be overthrown, unless it should appear from other evidence that the leakage could have arisen from no other cause than the defective state of the casks.

This leads me to consider whether any and what effect can be attributed to the fact that wool and rags were stowed with the oil. All agree that heat will injuriously affect the casks. Will the wool, and especially this wool as stowed, produce this result?

[After stating the evidence on both sides.] I think the true conclusion to be drawn is, that whether wool will affect oil depends on circumstances; upon its comparative quantity; in its quality, whether greasy or not; the mode of stowage, the ventilation. Personally, I can draw no conclusion from the mode of stowage;

and therefore I do not comment upon it. I think the result of the evidence is properly expressed by one of the witnesses when he said that the stowing wool with oil is "risky."

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Then how does this case stand? It is clear that there was great leakage, and that it was not occasioned by the weather. Two causes only for the leakage are suggested—the state of the casks, and the effect of the wool. I am of opinion that the casks were not so defective as to occasion the whole of the extraordinary leakage. Then the only remaining possible cause is the effect of the wool upon the oil; and though some of the evidence denies that the wool was the cause in this particular case, all agree that wool might heat and occasion oil casks to leak. Under these circumstances I am compelled, by what I must term the exhaustive method of reasoning, to conclude that the stowage of the wool in the hold with the oil was the cause of this leakage. It is possible that in some degree this leakage may have been occasioned by the defective state of one, two, or more casks; but it is wholly impossible for me in this judgment to pursue inquiry as to the particular casks.

The stowage of the wool with the oil was hazardous; and proved to be the cause of the leakage.

Assuming, then, that the loss was occasioned by reason of improper stowage, by want of sufficient separation of the oil and wool by bulkheads, or otherwise by want of ventilation, the question arises,—Have the plaintiffs a right of action against the ship in this Court? This is denied on the part of the defendants. Their argument, if I understand it aright, is as follows:—By the first section of 18 & 19 Vict. c. 111, the plaintiffs, as indorsees of the bill of lading, to whom the property in the goods has passed by reason of the indorsement, have had transferred to and vested in them all rights of suit and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with themselves. Then by the sixth section of "The Admiralty Court Act, 1861," practically the plaintiffs acquire the same rights against the vessel itself; consequently, the plaintiffs have no better right than Messrs. Lloyd & Co., who shipped the oil. Then it is argued that Messrs. Lloyd & Co. would have had no right; and, therefore, that the plaintiffs have none. The ground on which it is contended that the shippers, Messrs. Lloyd & Co., would have had no right, is, that they, and not the master, were responsible for the defective stowage; for it is said, Messrs. Lloyd & Co. were the charterers; by the terms of the charter they furnished the whole cargo, that is, not only the oil sold to the plaintiffs, but the rags and wool also; and by the charter also the cargo was to be taken alongside and from alongside the ship by the merchants at their own risk and expense, and to be received and stowed by the

For the loss so caused the shippers would have had a remedy against the master, notwithstanding the goods were stowed as provided in the charter.

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master as it might be presented for shipment. But though this was so, and although the shipping of the oil with wool is, as I think it is proved by the evidence, a hazardous measure, yet, if the master of the vessel will take them both together, I apprehend he is bound to take extraordinary precautions to prevent mischief, and cannot protect himself by showing that both the kinds of goods were sent on board by the same person; for an authority by the shipper or charterer to stow the goods clearly does not amount to an authority to stow them in a careless or negligent manner; for which I cite *Hutchinson v. Guion* (a). Again: it is said that the whole cargo was, in accordance with the charter, stowed by a head stevedore, appointed by the charterers, and, therefore, that the master could not be liable for bad stowage. But, on reference to the charter, it appears that the terms were, "the charterers being allowed to appoint a head stevedore at the expense and under the inspection and responsibility of the master for proper stowage." These words appear to me to answer the objection, and remove the case out of the authority of *Blakie v. Stemberge* (b), where similar words were not contained in the charter-party, and where the Court held that the true construction of the charter-party to be, that the cargo was to be brought alongside at the risk and expense of the charterer, and that it was to be shipped and stowed by his stevedore, and consequently at his risk—though at the expense of the shipowner, and subject to the control of the master, on behalf of the shipowner, to protect his interests. There seems, therefore, no reason for saying that Messrs. Lloyd & Co. would have been estopped from suing the master for damages on account of improper stowage.

But if the shippers were estopped by matters arising out of the charter only, this would not affect the plaintiffs' rights under the bill of lading.

But even if they would have been estopped, why should it follow that the plaintiffs would be estopped also? The shippers and the assignees of the bill of lading do not stand to each other as agent and principal, but as vendor and purchaser. The rights and the liabilities which the assignee of the bill of lading under the first section of 18 & 19 Vict. c. 111, has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him; but in these cannot be included the rights and liabilities as between the shipper and the master dehors of that contract in respect of other goods, or of the charter-party. If so, the bill of lading would always incorporate the charter-party, which it never does unless expressly stated; *Chappel v. Comfort* (c). I think

(a) 5 C. B., N. S. 149, 162.

(b) 6 C. B., N. S. 894.

(c) 10 C. B., N. S. 802.

the rights of the plaintiffs as assignees of the bill of lading could not be curtailed by any liability of the charterers towards the master, not being a liability imposed upon the plaintiffs under the bill of lading. The objection, therefore, to the plaintiffs' right of action, I think, fails on every ground; and there must be judgment for the plaintiffs, with costs, and a reference to the Registrar.

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Chester & Urquhart, solicitors for the plaintiffs.

Deacon & Son, proctors for the defendants.

THE HELENE.

In the Privy Council.

Present—THE LORD JUSTICE KNIGHT BRUCE.
SIR JOHN TAYLOR COLERIDGE.
SIR EDWARD VAUGHAN WILLIAMS.

Bail Bond—Security for Costs.

The form of bail bond appointed to be given in the Admiralty Court by the Rules of 1859, to answer judgment "with costs," does not receive a new interpretation from the 33rd section of the stat. 24 Vict. c. 10, and does not extend to cover the costs of an appeal. On an appeal from the Admiralty Court to the Privy Council, the appellant (at least, if resident out of the jurisdiction) will be required by the Privy Council to give security for the costs of the appeal. An appellant will not be required to enlarge any security which he gave as defendant in the Court of Admiralty to answer judgment and costs in that Court, notwithstanding such security has proved insufficient for that purpose.

THE defendants having entered an appeal from the foregoing judgment, the respondents made an application to the Judicial Committee for an order upon the appellants to give security for costs; their case stated the following circumstances:—

June 16.

"On the 1st November, 1864, the respondents T. and H. Briscall and Company, who carried on business as oil merchants at Liverpool, and who were the owners of and assignees of the bills of lading of certain oil which had been carried into Liver-

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pool in the Prussian brig *Helene*, instituted a cause in the High Court of Admiralty against the said brig, under the sixth section of "The Admiralty Court Act, 1861," to recover damages for the loss of part of the oil caused by the negligence of the servants of the appellants the owners of the brig.

The loss was then estimated by the plaintiffs at the sum of 432*l.* 16*s.*, and the cause was instituted in the sum of 600*l.*, leaving the sum of 167*l.* 4*s.* to cover costs.

Upon the vessel being arrested, Edward Wilhelm Ohrloff and others, of Barth, in the kingdom of Prussia, the owners, appeared and gave bail to the amount of 600*l.* to answer judgment in the cause and costs (according to the usual form of such bail bonds), and the vessel was thereupon released.

On the 3rd of March, 1865, the Judge of the Admiralty Court gave judgment in favour of the plaintiffs, and condemned the owners and their bail in the damages proceeded for, and in costs. From this judgment the owners, who were all foreigners, resident in Prussia, appealed.

The costs of the proceedings in the Court below, together with the damages sustained by the plaintiffs, already exceed the amount of 600*l.*"

The case concluded by praying the Court "to order the appellants to give security to such an amount, and within such time as should to their Lordships seem right, to answer the respondents' costs in this cause in the Court below, and in the Court of Appeal; and to order that, in default of such security being duly given, the appeal should stand dismissed."

The motion was supported by an affidavit of one of the respondents and their solicitor setting forth the above facts.

The form of bail bond, which had been given in the Court below, was as follows:—

" In the High Court of Admiralty of England.

" *The Helene*, — master.

" Whereas a cause has been instituted in the High Court of Admiralty of England on behalf of T. and H. Briscall and Company, of Liverpool, against the brig *Helene*, her tackle, apparel and furniture, and against Edward Wilhelm Ohrloff and others, of Barth, in the kingdom of Prussia, the owners of the said brig intervening: Now therefore we, A. B. and C. D., hereby jointly and severally submit ourselves to the jurisdiction of the said Court and consent that if they, the said Edward Wilhelm Ohrloff and others, shall not pay what may be adjudged against them in the said cause with costs, execution may issue

forth against us, our heirs, executors and administrators, goods and chattels for a sum not exceeding 600*l*.

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A. B.
C. D.”

This bail bond was signed by the said A. B. }
and C. D., the sureties, the —— day }
of —— 1865. Before me, &c.

Lushington, in support of the motion.—The respondents, it is submitted, are entitled, as a matter of course, to security for the costs of the appeal: (*MacPherson on the Practice of the Privy Council*, p. 156.) It is further submitted that they ought to have security for such costs in the Court below as are not in fact covered by the bail bond. The theory of proceedings in the Court of Admiralty is that the plaintiff should have security for his costs as well as his damages: and the Court, to carry out this principle, has frequently allowed the amount of an action to be increased after its institution. [Sir *J. Coleridge*.—You admit that there is no instance of requiring further security after judgment given.] Not after judgment given; but if the plaintiff has security when his claim is uncertain, why should he not have security when his claim is ascertained to be right?

R. G. Williams, for the appellants.—[Lord Justice *Knight Bruce*.—The only question is as to security to meet the costs of the appeal.] An appeal lies as a matter of right, and the Court will not order security for the costs unless justice appears to require it. Now, owing to the proceedings of the Admiralty Court being in rem, the appellants have already been under the disadvantage of giving security to the respondents to a large amount, exceeding their substantive claim: in no other Court could a plaintiff have had such an advantage, or a defendant have been required to give such security. It is submitted, therefore, that the appellants should not be called upon now to give any further security. But the respondents here are themselves to blame: they might have, in the first instance, got bail to answer costs both in the Court below and in the Court of Appeal; for the 33rd section of “The Admiralty Court Act, 1861,” provides: “In any cause in the High Court of Admiralty bail may be taken to answer the judgment as well of the said Court as of the Court of Appeal, and the said High Court of Admiralty may withhold the release of any property under its arrest until such bail has been given; and in any appeal from any decree or order of the High Court of Admiralty, the Court of Appeal may make and enforce its order against the surety or sureties who may have signed any such bail bond in the same manner as if the bail had been given

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in the Court of Appeal." [The Registrar here stated, that the costs of appeal were always taxed in the Court of Appeal; that they were generally paid without demur; that the form of bail bond given in the Admiralty Court had not been altered so as to extend to the costs of appeal, as to which, therefore, the Court of Admiralty had no jurisdiction.] If your Lordships think it necessary to order security for the costs of the appeal, I would submit that the alternative should not be that the appeal should stand dismissed, but only that the proceedings should be stayed, according to the practice of the Common Law Courts.

Lushington, in reply, pointed out that the form of bail bond, like that of other instruments used by the Court, is authorized by the Rules of 1859, and that no valid change could be made in these rules without an Order in Council, as provided by 3 & 4 Vict. c. 65, s. 18.

Judgment.

The Lord Justice KNIGHT BRUCE:—If it be admitted that security is given in cases where the appellant is out of the jurisdiction, what is there to exempt this case from the ordinary rule? The form of the bail bond is the same now in use as it was before The Admiralty Court Act of 1861 (24 Vict. c. 10) came into operation. It was then construed to have reference only to costs in the Court of Admiralty, and not to extend to costs in the Appellate Court. Their Lordships see no reason for holding that that statute introduces a change of interpretation on the old form of bail bond. Section 33 of that statute gives power to the Court of Admiralty to extend its requirements by a new form of bail bond. That power, however, is discretionary, and although the Court of Admiralty has authority to make new forms, that could only be done under the sanction of an Order in Council, which has not yet been obtained, though we understand that a new form will speedily be issued. The old form of bond, therefore, alone exists, and must be construed as it always has been. There is consequently no security for the costs of this appeal, and the appellants, being foreigners, domiciled abroad, must, according to the ordinary rule, give security for costs. Their Lordships are of opinion, having regard to the amount of issue and of the expense of appeal, that bail to the amount of 200*l.* should be given within three months to answer costs of appeal, and in default the appeal to be dismissed. Costs of this application to be costs in the cause.

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Aug. 4.

In the Privy Council.

THE HELENE.

*Bill of Lading—Memorandum excepting Liability for Leakage—
Negligence—Burden of Proof.*

Where, by the memorandum in the margin of a bill of lading, the shipowner is "not accountable for leakage," the word leakage is not to be limited to "ordinary leakage" only, but the memorandum protects the shipowner as to all leakage except that caused by negligence.

In an action upon such a bill of lading to recover damages for loss by leakage of any kind, the burden of proof is on the plaintiff to show that the leakage was caused by negligence.

A charterparty provided that the cargo should be taken alongside by the charterer, and be received and stowed by the master as presented for shipment, the charterer being allowed to appoint a head stevedore at the expense and responsibility of the master for stowage. The cargo was received and stowed accordingly, the whole being shipped by the charterer, who also was on board during the loading, and made no complaint, and saw the mode of stowage. Amongst other things oil was shipped in casks, and rags and wool were stowed in the same hold over and near it, without any bulkhead between. Bills of lading for the oil, making no reference to the charter, but containing a memorandum in the margin "not accountable for leakage," were assigned to merchants, the purchasers of the oil, who had no notice of the charter. On the voyage extraordinary leakage from the oil casks took place, by the wool and rags heating the casks and causing them to shrink. The assignees sued upon the bill of lading to recover damages for the loss of the oil. Conflicting evidence was given whether the juxtaposition of rags and wool to oil in the same hold was known to be a dangerous mode of stowage.

Held, upon the evidence, that the master did not know, and was not bound to know, the heating tendency of wool and rags on oil casks if placed in contiguity; and that, if he did know it, he was not in the circumstances bound to go to the expense of putting up bulkheads between the wool and rags and the oil, to separate them; and that the leakage, therefore, was not caused by negligence.

Quære, whether in an action by the assignees of the bills of lading under 18 & 19 Vict. c. 111, for damage to the goods by bad stowage, the assent of the shipper to such stowage affords any defence.

THIS was an appeal from the judgment of the High Court of Admiralty, reported ante, p. 415, where the facts are fully set out. The case was twice argued; first, before the Lord Justice Knight Bruce, the Lord Justice Turner, and Sir Edward Vaughan Williams; secondly, before Lord Chelmsford, the Lord Justice Knight Bruce, the Lord Justice Turner, Sir John Taylor Coleridge, and Sir Edward Vaughan Williams.

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1st. If a bill of lading contains a memorandum, “not accountable for leakage,” the shipowner continues responsible for leakage caused by negligence, *Phillips v. Clark* (a); but the memorandum covers him against all other leakage whatsoever. The question here, therefore, was not whether the leakage was ordinary or extraordinary, but, was the loss occasioned by the shipowner’s negligence? On that issue the burden of proof was on the plaintiffs, whereas the Court below wrongly adjudged it to be upon the defendants. Thus, in *Lloyd v. The General Iron Screw Collier Company* (b), where the shipper sued the shipowner for the loss of his goods occasioned by a collision of the defendants’ ship with another ship, and the shipowner pleaded the excepted perils, to which the shipper replied that the perils were incurred by the gross negligence of the defendants, the plaintiffs would have had to prove their replication. In the case of *Grill v. The General Iron Screw Collier Company* (c), which arose out of the same collision, and where the pleadings were the same, Erle, C. J. left it to the jury to say “whether the collision which caused the loss of the goods was occasioned by the negligence of the defendants’ crew.”

2ndly. There was no evidence of negligence on the part of the defendants. The evidence does not show that it was a want of common care and skill to stow the oil contiguous to the wool, or so stowing the goods to omit to put up bulkheads between them, or to take extraordinary precautions of any kind. In considering the question of negligence the terms of the charter must be borne in mind.

3rdly. The shippers were clearly consenting parties to the mode of stowage, and they therefore could not sue for damage so occasioned, *Hovill v. Stephenson* (d), where Tindal, C. J. ruled that if the charterers, by their conduct during the ship’s loading, induced the shipowner to suppose that they consented to a certain partition being put up in the ship, whereby a full cargo could not be carried according to the charter, they could not sue for such breach of contract, and the jury found for the defendant.

4thly. If the shippers could not sue, neither could the plaintiffs, as assignees of the bills of lading: for the statute 18 & 19 Vict. c. 111, gives them only the shippers’ rights. [Sir E. Williams referred to *Smurthwaite v. Wilkins* (e).] In *Major v.*

(a) 2 C. B., N. S. 156.

(b) 3 H. & C. 284.

(c) Law Rep., 1 C. P. 600.

(d) 4 C. & P. 469.

(e) 11 C. B., N. S. 842.

White (a), where the damage was proved to have been occasioned by bad stowage, but evidence was given that the shipper was aware of the manner in which the goods would be stowed, and made no objection, Parke, B., nonsuited the plaintiff, saying: "If the shipper of the goods was warned as to the way in which they would be stowed, the plaintiff as consignee cannot maintain any action for damage occasioned by bad stowage."

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We contend here, moreover, that the shippers were the agents of the plaintiffs to ship, because the property in these casks of oil had already passed to the plaintiffs. The evidence as to the purchase indicates that the identical casks of oil were bought by the plaintiffs before shipment, and that shipment was on their account. *Coxe v. Harden (b)*, *Fragano v. Long (c)*, *Bloxam v. Saunders (d)*.

Brett, Q.C., and *Lushington* for the respondents.—1st. The memorandum, "not accountable for leakage," exempts only for ordinary leakage, which in oil cargoes is proved to be 1 per cent.: it is like the memorandum in policies of insurance. Extraordinary leakage may mean 99 per cent. *Phillips v. Clark (e)* was on demurrer, and only decides that if the leakage is by negligence, the shipowner remains liable.

2ndly. Whatever the construction of the memorandum, the burden of proof was on the shipowner to show the cause of the loss: he is an insurer, subject to certain perils and causes which he specially excepts, and he should bring himself within the exception: Story on Bailments, sect. 529. Another reason is, that he has the means of knowing the facts, which the owner of the cargo generally has not.

3rdly. The loss was occasioned by the stowing the wool upon the oil in contiguity to it, and without taking the needful precautions to avoid the heating. This was negligence. It does not follow that because the cargo was stowed as presented for shipment, it was therefore necessary to stow the oil and wool in this manner. *Alston v. Herring (f)*.

4thly. The shipper would not have been precluded from suing in this case under the charter. The stevedore was and is the master's servant. The responsibility of the master for the stowage was in the master. *Sack v. Ford (g)*, *Roberts v.*

(a) 7 C. & P. 41.

(b) 4 East, 212.

(c) 4 B. & Cr. 219.

(d) 4 B. & Cr. 941.

(e) 2 C. B., N. S. 156.

(f) 11 Exch. 822.

(g) 13 C. B., N. S. 90.

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Shaw (a). The omission of the shippers to remonstrate upon the mode of stowing did not in any degree relieve the master of his liability. It was not the shipper's duty to see how the cargo was stowed, or to make remarks upon it; he may have properly left that entirely to the shipmaster, *Hutchinson v. Guion (b)*.

5thly. But if the shipper was barred by his own act, this should not affect the plaintiffs as assignees of the bill of lading. The assignee takes the bill of lading without knowledge of the charter or the charterer's act; and the statute gives him the same rights and liabilities as if the contract contained in the bill of lading had been made with him: his rights and liabilities depend on that contract only. The cases settle that the mutual rights of the shipowner and the assignee of the bill of lading are independent of the charter, except so far as the bill of lading may expressly incorporate it. Thus the assignee is not liable for demurrage, *Chappel v. Comfort (c)*, or for charter-party freight, *Foster v. Colby (d)*. The importance of making bills of lading freely negotiable is a good reason for allowing the assignee in certain cases to have better rights than the shipper. Thus, as to stoppage in transitu, the second indorsee has an immunity, which his indorser, the original vendee, has not. So the shipowner has no lien on the goods for freight against the assignee, where the bill of lading states the freight to be prepaid, though the shipper's bill, by which it was prepaid, has proved valueless: *Kirchner v. Venus (e)*. There is no ground for saying, that in this case the shipper was the plaintiff's agent to ship. The defendants should have made it plain by cross-examination of the plaintiff, when the property passed to him. [Sir *E. Williams* referred to *Tronson v. Dent (f)*.] It may have been that in this case there was no appropriation to the plaintiffs, in consequence of the shipper keeping the bill of lading in his own hands until receiving payment. *Wait v. Baker (g)*; *Blackburn on the Contract of Sale*, p. 134.

Judgment.

The Lord Justice TURNER:—This is an appeal from a judgment of the High Court of Admiralty, in an action brought by the respondents under the provisions of The Admiralty Act, 1861, as owners and assignees of the bill of lading of forty-seven casks of oil against the *Helene*, of which the appellants were owners,

(a) 4 B. & S. 44.

(b) 5 C. B., N. S. 155; per *Willes*, J.

(c) 10 C. B., N. S. 802.

(d) 3 H. & N. 705.

(e) 12 Moore, P. C. 392.

(f) 8 Moore, P. C. 419.

(g) 2 Exch. 1.

and in which the oil had been carried from Leghorn to Liverpool. When the ship arrived there many of the casks were partially empty, and this action was brought to recover damages for this leakage of the oil, as having been occasioned by negligence and breach of contract, and breach of duty on the part of the appellants.

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The great question in the action was one of fact, viz., what was the cause of the leakage which was the subject of complaint? The learned Judge of the Court of Admiralty decided this question, after a most complete and able examination of the evidence, and we see no reason to find fault with his decision. The evidence, in his opinion, established that the leakage was caused, not by the perils of the sea, not by the defective quality of the casks, but by their being stowed in the same hold with some rags and wool, which formed part of the cargo which was taken on board at the desire of the charterers.

The cause of leakage was the stowage of rags and wool in the same hold with the oil.

Assuming that this was the cause of the leakage, the appellants, the shipowners, deny that they are responsible for it, because, by the memorandum in the margin of the bill of lading, the shipowners are not to be accountable for leakage.

The memorandum in the bill of lading "not accountable for leakage," protects the shipowner from all leakage except leakage caused by his negligence. (See also p. 435.)

On the argument different views were suggested by counsel as to the meaning of this word "leakage." For the respondents it was contended that the word means only ordinary leakage (which, according to the evidence, amounts to 1 per cent.), and does not extend to extraordinary leakage such as that in question amounting to an alleged deficiency of 2,000 gallons.

On the part of the appellants it was denied that, according to the natural and ordinary meaning of the words employed, the amount of leakage was at all limited in quantity; but it was conceded that, in accordance with the case of *Phillips v. Clark* (a), the words in the margin did not protect the shipowners from responsibility for leakage occasioned by their own negligence.

It was, however, contended, on behalf of the appellants, that the plaintiffs must, in order to entitle themselves to the action, give satisfactory proof of such negligence, and that they had failed to do so; and, after a careful consideration of the case, we have come to the conclusion that this contention on behalf of the appellants is well founded.

The burden of proof is on the shipper to prove that the leakage was caused by negligence.

Notwithstanding the evidence of the notoriety at Liverpool of the deleterious consequences of the collocation of oil in casks with rags and wool, or other matters tending to generate heat, we do not believe that either the shippers or the shipowners in

Upon the evidence the master was ignorant that the mode of stowage was dangerous to the oil;

(a) 2 C. B., N.S. 156.

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and he stowed the goods in accordance with the charter, as presented for shipment by the charterer, and with the charterer's knowledge and assent; such stowage therefore did not amount to negligence on his part.

Even if the master knew, or ought to have known the consequences of such stowage, he was not bound to go to the expense of putting up bulkheads to separate the goods.

this case were aware of them. If the shippers knew of them, they also knew that the wool and rags, which they made a part of the cargo, must necessarily be stowed and were in fact stowed in the single hold of the ship, and with this knowledge we think it impossible that they should have abstained from mentioning the inevitable leakage in the then condition of the ship, and from requesting some means to be applied to prevent it, such as dividing the hold by bulkheads. Nor do we think the shipowners were in a better state of knowledge on the subject. Had they been so, it is inconceivable, as it seems to us, that they should have received a cargo so composed without some remonstrance with the shipper for selecting such mischievous companions to form part of the cargo with the oil.

If the shipowners were ignorant of the consequences of taking such a cargo, we do not think it amounted to culpable negligence on their part to stow in the only place they could be stowed the goods which, under the charter-party, the charterers had a right to insist, and did insist, should form part of the cargo.

On this question it is, in our opinion, very material to consider not only that the charterers so insisted, but also that the cargo was, according to the terms of the charter-party, received on board and stowed as it was presented for shipment by them, and that they were shown to be very frequently on board as the stowage progressed, and were well acquainted with the mode of stowage (which was effected in a masterly way), and never made any complaint of or objection to it.

Nor do we think the ignorance of the shipowners in itself amounted to negligence. It can hardly be imputed as misconduct that the shipowners should be ignorant of latent mischief of this nature, when Lloyd & Co., who are proved to have had very great experience as oil merchants, were in the same state of ignorance.

But even if the appellants knew, or ought to have known, what the consequences of such stowage must be, we are not prepared to say that they were guilty of negligence in not putting up bulkheads. Assuming that they could be so constructed as to protect the part of the hold where the oil was stowed from the influence of the heat generated by the wool and rags, still this could not have been done without much trouble and considerable expense, which we cannot concede that the shippers had a right to throw on the shipowners, because the shippers chose to load the ship they had chartered with a cargo of such a nature. And to this we may add that, even supposing the shipowners to have been aware of the usual consequences of stowing such a cargo in the same hold, they might have well

come to the conclusion that the shippers were also aware of them, and would not have put such a cargo on board unless they had been assured that the casks were of such extraordinary strength and goodness as to be capable of resisting the usual influence of a heated temperature.

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For these reasons we think the respondents failed to prove that the leakage was caused by the appellants' negligence.

It may be observed that the learned Judge of the Admiralty Court appears to have adopted the construction of the word "leakage," contended for by the respondents, viz., that it means "ordinary leakage" only, and consequently the judgment adverts but little, if at all, to the question whether negligence on the part of the shipowners had been proved. But we do not think such a construction allowable. The condition that the shipowners are not to be accountable for leakages does not, in its ordinary and grammatical sense, put any limit to the quantity of leakage; and on principle, therefore, we do not think it would be justifiable to add any such limit to its terms. Nor are we aware of any authority for doing so. It follows that, in our judgment, the memorandum in the bill of lading protects the shipowner as to all leakage except that caused by negligence, and, therefore, if no negligence is shown, there is no cause of action.

Another point was raised and argued before us, viz., that the conduct of the shippers as to the stowage was such that it would support a plea of leave and licence by the shippers if the action had been brought by them. But it was contended on behalf of the respondents that, by reason of the Bills of Lading Act, 18 & 19 Vict. c. 111, such a plea was not allowable in an action by the indorsees of the bill of lading. It is unnecessary, however, to decide this point, as our opinion is against the respondents on the question of negligence.

Quære, whether the assent of the shipper to the mode of stowage would be available as a defence to the action by the indorsee of the bill of lading.

On these grounds their Lordships will humbly advise her Majesty that the judgment of the Court of Admiralty should be reversed, with costs, both in the Court below and on this appeal.

Judgment reversed, with costs.

Nethersole & Speechly, solicitors for the appellants.

Chester & Urquhart, solicitors for the respondents.



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THE FLYING FISH.

In the Privy Council.

Present—LORD CHELMSFORD.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

Collision—Appeal from Registrar's Report of Damages—Fresh Evidence—Rule of Consequential Damages.

The Rules of 1859 do not abridge the discretion of the Judge of the Admiralty Court to admit fresh evidence on an appeal from a report of the Registrar; but such discretion is to be exercised with great caution, and with a careful regard to the peculiar circumstances of each case.

Upon a decree pronouncing generally for damages occasioned by a collision, and ordering a reference to the Registrar to assess the amount, the defendant is not liable for such damages as might have been avoided by the exercise of ordinary nautical skill and diligence after the collision on the part of the servants of the plaintiffs in charge of their ship. If upon such reference the plaintiffs present a case of immediate partial damage resulting in the total loss of their ship, and no evidence is given on either side of the pecuniary extent of such partial damage, and the Registrar is of opinion that the plaintiffs are not entitled to recover the total loss upon the ground that by ordinary skill and diligence after the collision they might have avoided it, but are entitled to recover the partial damages, he should not assess the amount of the partial damages conjecturally and report such amount to be due, but should make a special report to the Court; and the Court will then order a further reference to ascertain the amount of the partial damages by evidence. If a collision takes place between two vessels by the negligence of the crew of the defendants' vessel, whereby the plaintiffs' vessel suffers damage and is necessarily run aground, and afterwards and before any expenses are incurred, by the negligence of the plaintiffs' servants, a total loss of the plaintiffs' ship ensues, the defendant is not liable for such total loss of the plaintiffs' ship, but is liable for the expense which would have been incurred in making good the partial damage.

THIS was an appeal from a decree of the Admiralty Court, reversing a report of damages made by the Registrar and Merchants.

The cause was originally brought against Warren Hastings Anderson, the captain of her Majesty's ship Flying Fish, by Adrian Hoem, of Amsterdam, the managing owner, and others the remaining owners of the late ship Willem Eduard, and of Messrs. Cotesworth & Powell, Messrs. John Fair & others, of London, merchants, the owners of the cargo, and by her master and crew for their private effects, to recover damages arising out of a collision which occurred between the Flying Fish and the

Willem Eduard, off Rye, on the night of the 30th November, 1861.

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The cause was heard on the 5th of March, 1863, when the learned Judge, assisted by Trinity Masters, pronounced for the damage sued for, and referred the amount to the Registrar and Merchants.

The circumstances of the loss of the Willem Eduard are set out in the judgment of the Privy Council, reported post. Here it is necessary only to state that at the reference the plaintiffs called no witnesses, but simply referred to the evidence which had previously been taken at the hearing, and that the defendants produced several witnesses to prove that, after the plaintiffs' vessel had been run on shore in consequence of the collision, the master did nothing to save the ship, and improperly declined to accept the assistance which was offered to him by coastguardmen, whereby a loss nearly total of ship and cargo ensued. The total value of the ship and cargo was estimated at 10,910*l.* 11*s.* 8*d.*, and the net proceeds were 2,623*l.* 13*s.* 2*d.* The plaintiffs claimed the balance 8,286*l.* 18*s.* 6*d.*

On the 30th December the Registrar made his report. He therein stated, that, in the opinion of himself and the merchants, "the master of the Willem Eduard showed both a great want of ordinary nautical skill in not taking any measures to save the vessel before the tide rose, and gross neglect of duty in not accepting the services of the coastguardmen; and that the owners were not entitled to recover the damage occasioned by his misconduct." The report concluded:—

"It only remains then for us to say what ought to be the measure of the damages which the owners are entitled to recover as directly arising from the collision. It appears that the vessel was seriously damaged in her port quarter, that the steering apparatus was deranged, and that the main rigging on the port side was carried away, the result of which was that the mainmast went overboard; it was also admitted that the master was not to blame for beaching his vessel after the collision. We were therefore of opinion that the damages to which the owners are entitled are, first, for the cost of the repairs to the vessel at the port to which she might have been taken, including the discharge and reloading of the cargo, and the demurrage and port charges—this we have estimated at the sum of 610*l.*; secondly, a reasonable sum for the services of the coastguardmen, and of the steam-tug in rescuing her from the shore, and taking her to a port of safety; and as the whole value of the ship and cargo is estimated by the owners at 10,910*l.*, we think that 500*l.* would have been a proper remuneration to the salvors for their services.

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"We have therefore estimated the damages at the sum of 1,110*l.*, and shall allow interest thereon at four per cent. per annum, from the 1st day of January, 1862, when the repairs would probably have been completed, and the accounts settled."

This report was objected to by the plaintiffs, who filed a petition, praying the Judge to refer back the report to the Registrar for amendment and to condemn the defendant in costs. An answer was filed on behalf of Captain Anderson, praying the Judge to confirm the report.

The case came on for hearing on the 21st June, 1864, when witnesses were tendered for examination on behalf of the plaintiffs.

Counsel for the defendant objected that it was not competent to the plaintiffs, who had not produced any witnesses before the Registrar and Merchants, now to produce witnesses. The learned Judge overruled the objection, and five witnesses were produced and examined for the plaintiffs.

On the 2nd of August DR. LUSHINGTON gave judgment, reversing the decision of the Registrar and Merchants, upon the ground that the evidence did not establish against the master of the Willem Eduard gross nautical ignorance or gross negligence, and that the defendant was liable for the total loss. The learned Judge referred the report back to the Registrar, but condemned the plaintiffs in the costs of the reference, and made no order as to costs incurred in the hearing of the objection to the report. The material part of his judgment is set out, post, p. 441.

From this judgment the defendant Captain Anderson appealed.

The *Queen's Advocate* (Sir R. Phillimore, Q.C.), the *Admiralty Advocate* (Dr. Twiss, Q.C.), and *Phinn*, Q.C., for the appellant.

Dr. *Deane*, Q.C., and *Brett*, Q.C., for the respondents.

On the 8th of March LORD CHELMSFORD delivered the judgment of the Committee.

Judgment.

In this appeal no question has been raised as to the appellant's liability for damages arising from the collision, which was the subject of the action, but he objects to the decree of the Judge of the Court of Admiralty, so far as it renders him liable to a portion of the damages, which he contends was the result, not of the collision itself, but of the absence of nautical skill on the part of the captain of the respondents' vessel in making no effort to rescue her from the peril in which she was placed by the im-

mediate consequence of the collision, and of his want of prudence and judgment in refusing assistance which was offered to him, and which if it had been accepted would probably have prevented all the damage which afterwards ensued.

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The collision happened about twenty minutes past nine, P.M., 30th November, 1861, in the English Channel, off Hastings, by her Majesty's gun-boat Flying Fish, of which the appellant was commander, running with her stem and port bow into the port quarter of the respondents' vessel, the Willem Eduard. It is admitted that the blame of this collision must be attributed solely to the appellant. The effect of the blow received by the Willem Eduard was that a hole was made in her stern about five or six feet above the water line, and the steering gear was disabled. The master believing that the vessel was making water, and was in danger of sinking, rigged a temporary steering apparatus, and stood in for the land, which he reached at about midnight of the same day, and ran her ashore three miles from Rye Harbour. The tide was then about half ebb. The night was dark, the wind being W.S.W., and the weather cloudy and squally. The coast guard, who were on duty at a station near Rye, being desirous of rendering assistance, and the surf on the beach being heavy, carried their boat and launched it abreast of the vessel, and got aboard of her about two o'clock in the morning. Attersoll, the chief boatman, in the presence of Tremble, a commissioned boatman of the coast guard, told the captain of the Willem Eduard that he was three miles from Rye Harbour, that where his vessel was lying was sand and no rocks, and that if he would give him charge of her he had no doubt that he could get her safe into Rye Harbour. But the captain refused this offer, stating, "It would be of no use trying." Attersoll then asked to be allowed to get out an anchor, but the captain said "No." He then inquired what he intended to do; the captain replied, "It is no use, the wind will be from the south-west, and the ship will go to pieces." Attersoll, after waiting some time longer to see if the captain would allow him to do his best to get the vessel into a place of safety, at about three o'clock got over the side of the vessel, and walked ashore, the tide having ebbed and left her high and dry. After Attersoll quitted the vessel, Tremble, who stayed behind, pointed out to the captain that the wind was two points off the land, and that they could get the vessel off, she being three miles to windward of the harbour, but "he still refused to let them try."

Attersoll returned to the vessel at four o'clock, when he and Tremble procured a light and walked round the vessel, which was still dry, and all the damage they could discover was on her

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stern and quarter, about five or six feet above the water line, and they asked the captain to give them some canvass and nails for the purpose of nailing the canvass over the damaged part, which he refused to do. When Attersoll got on board again, he asked the captain what he intended doing, and he answered, "The vessel will go to pieces." And upon Tremble proposing to get her port anchor out, he replied angrily, "No anchor—no good." At five o'clock the tide began to flow, when Mr. Groom, the Receiver of wreck for the port of Rye, and Mr. Buck, the chief officer of the coastguard station, went alongside the vessel, and repeatedly urged the captain to accept the services of the coastguard men, but he still refused all offers of assistance. At five o'clock the captain and the crew left the vessel, the men carrying their clothes and chests with them, and the captain taking away his chronometer. As the tide rose the vessel floated, and a little before seven o'clock, the port wing of the foresail and gaff of the fore-trysail not being properly brailed up the wind caught these sails, and carried the vessel on to the beach. As she was driving into the beach, the mainmast went overboard. At seven o'clock, after the vessel was on the beach, there having been no one on board from five to seven o'clock, and nothing having been done during that time, the captain said the coastguard might try their best, and he gave charge of the vessel to them, but it was then too late for any effectual services to be rendered. When the vessel was seen about half-past nine she was lying broadside on to the land, full of water, and the sea breaking over her. She afterwards went to pieces on the beach and the greater part of her cargo was destroyed. The total value of the ship and cargo was 10,910*l.* 11*s.* 8*d.* The nett proceeds of the sale of the wreck and cargo was 2,623*l.* 13*s.* 2*d.*

Registrar's
report.

Upon the hearing of the cause the learned Judge, who was assisted by two of the elder brethren of the Trinity House, pronounced for the damage sued for, and referred the question of amount to the Registrar and Merchants to report upon. The respondents, before the Registrar and Merchants, claimed compensation for a total loss, amounting to 8,286*l.* 18*s.* 6*d.*, after giving credit for the nett proceeds of the sale of the wreck, and of the cargo recovered. The appellants denied their liability for the damage consequent upon the refusal of the master to accept the services of the coastguard. No affidavits were used by the respondents, nor were any witnesses produced by them before the Registrar and Merchants; but they relied entirely upon the written evidence filed in the cause. On the part of the appellant six witnesses were examined, all of whom had been present when the services of the coastguard were tendered and refused, and they were cross-examined on behalf of the respondents. The

Registrar reported that he was of opinion, for the reasons which he set forth in an exhibit to his report, that there was due to the respondents in respect of the damage proceeded for the sum of 1,110*l.*, together with interest thereon at 4 per cent. The reasons for this opinion were stated to be that the master showed both a great want of ordinary nautical skill in not taking any measures to save the vessel before the tide rose, and gross neglect of duty in not accepting the services of the coastguardmen; that therefore the damages to which, in the opinion of the Registrar and Merchants, the respondents were entitled were, 1st, the cost of the repairs to the vessel at the port to which she might have been taken, including the discharge and reloading of the cargo, and the demurrage and port charges, which they estimated at the sum of 610*l.*; and 2ndly, a reasonable sum for the services of the coastguard, and of the steam-tug in rescuing her from the shore and taking her to a port of safety; and as the whole value of the ship and cargo was estimated by the owners at 10,910*l.*, they thought that 500*l.* would have been a proper remuneration to the salvors for their services.

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This report was objected to on the part of the respondents, and they filed a petition praying the Judge to refer it back to the Registrar for amendment, and the appellant filed an answer praying the Judge to confirm the report. At the hearing of this petition the respondents proposed to produce witnesses who had not been examined before the Registrar and Merchants. This was objected to on the part of the appellant, but the learned Judge overruled the objection, and five new witnesses were produced by the respondents. One witness who had been examined before the Registrar and Merchants was produced and examined by the appellant.

Judgment of
the Admiralty
Court.

The Judge by order referred back the report to the Registrar and Merchants for amendment, condemned the respondents in the costs incurred at the reference before the Registrar and Merchants, but made no order as to the costs incurred by the objection to the report. The learned Judge was of opinion "that the appellant had not substantiated his allegation that a large part of the damage was not to be attributed to the collision, but was solely occasioned by the master's refusal to accept assistance. That to establish that defence it ought to have been shown, not only that the master did refuse assistance as a matter of fact, but that such refusal arose from gross want of nautical knowledge, or *crassa negligentia*. That the true issue in the case was not whether the assistance of the coastguard or others, and the laying out of the anchor, might have been successful, but whether there was such reasonable doubt on the part of

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the master who refused the adoption of such measure, that he was justified in declining to run the risk ; or, putting it in other words, whether looking to the condition of the ship, the cargo, the weather, and the locality, he was guilty of gross nautical ignorance or gross negligence." The learned Judge stated that "had the case come before the Court solely upon the evidence produced before the Registrar and Merchants, he thought it most probable, indeed he entertained little doubt, that the Court would have come to the same conclusions, as to matters of fact, as they did." But after adverting to the evidence of the witnesses produced by the respondents on the hearing of their petition, he added, "with this evidence before me is it possible for me to come to the conclusion that the master was guilty of gross nautical ignorance, or of gross negligence?" and he concluded by expressing his opinion that, as "against a wrongdoer, which, in legal estimation, the Flying Fish must be taken to have been, it could not be maintained that there was no reasonable doubt as to the course to be pursued."

The new Rules of 1859 do not abridge the power of the Judge of the Court of Admiralty to admit fresh evidence on an appeal from a report of the Registrar, but such power is to be exercised with great caution, and with a careful regard to the peculiar circumstances of each case.

Upon the hearing of the appeal from this judgment, two points were insisted upon by the counsel for the appellant : 1st. That the learned Judge ought not to have received fresh evidence upon the objection to the Registrar's report ; and, 2ndly, That such evidence was not sufficient to lead to a decision contrary to such report. As to the admission of additional evidence the counsel for the appellant did not attempt to maintain that the learned Judge had no power to admit such evidence, but they contended that he thereby exercised his judicial discretion improperly. And they referred to former expressions of opinion of the same learned Judge strongly condemnatory of the course of withholding evidence at the reference, and making a new case before the Court, particularly in the cases of the *Sir George Seymour* (a), and the *Glenmanna* (b). They also insisted that the new rules made in pursuance of the acts of the 3 & 4 Vict. caps. 65 and 66, and 17 & 18 Vict. cap. 78, which came into operation on the 1st January, 1860, had introduced a new practice with respect to references before the Registrar, had armed him with more authority in conducting the inquiry, and had enabled the Judge to know the oral evidence taken before the Registrar by a transcript of the shorthand-writer's notes, and therefore had considerably limited the discretion previously exercised as to admitting additional witnesses. Their Lordships do not think that these rules have at all the effect of restraining the power of the Judge, or of fettering his discretion as to the admissibility of fresh witnesses upon these occasions, a discre-

(a) 1 Spinks' Adm. and Eccl. Rep. 67.

(b) Lushington, 122.

tion which it is unnecessary to say must always be exercised with great caution, and with a careful regard to the peculiar circumstances of each case.

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Now, taking the whole of the evidence on both sides into consideration, can it be said that the conduct of the captain of the *Willem Eduard*, after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill, and a gross neglect of duty? The learned Judge thought that in order to exonerate the appellant from liability to the subsequent damage to the vessel it was necessary to show that the master was guilty of "gross nautical ignorance, or of gross negligence." It appears to their Lordships that the principle upon which the owners of a vessel are to be exempted from liability for the acts or omissions of their master is not here laid down with perfect accuracy. The blame imputed to the master of the respondents' vessel in this case is, that he made no effort to save her, and that he refused all offers of assistance which were made to him; and the proper question seems to be, whether in so acting he did, in the words of Baron *Parke*, in *Tindal v. Bell* (a), "what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to;" or in the words of the learned Judge of the Court of Admiralty himself, in the case of the *Linda* (b), upon a question of abandonment, "whether the master had wilfully abandoned the vessel when he might have saved her, or had abandoned her through a want of *ordinary* nautical skill and resolution." It is to be observed that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel, and the captain had some hours to decide what course was best to be adopted. The learned Judge was of opinion that "as against a wrongdoer, which," he says, "in legal estimation the Flying Fish must be taken to have been, it cannot be maintained that there was no reasonable doubt as to the course to be pursued." But treating the Flying Fish as a wrongdoer is really begging the whole question. For the collision, and for all the consequences of that collision, the appellant is responsible. But if the subsequent damage resulted from the acts or omissions of the captain of the *Willem Eduard*, for that portion of the damage the appellant is not only not a wrongdoer, but he is not even to be regarded as the doer of the act which occasioned it. It is

The question is, Could the damages have been avoided by the exercise of ordinary nautical skill and diligence on the part of the master?

(a) 11 Mee. & W. 232.

(b) Swabey, 306.

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The right conclusion is, that here the master showed want of ordinary nautical skill and neglect of duty.

The Registrar was wrong in estimating the partial damages conjecturally, without evidence.

quite true, as the learned Judge has said, that "if there was a reasonable doubt on the part of the master whether the measure proposed, or any other measure, would have been successful, he was justified in declining to run the risk, and would not be guilty of nautical ignorance or gross negligence." But the master appears to have exercised no judgment at all in the matter, but at once to have abandoned himself to despair, and to have regarded all efforts to save the vessel as hopeless. [The judgment then discussed the evidence on this point and continued.] It is impossible for their Lordships to arrive at the conclusion that the master exercised any judgment at all upon the possibility of saving his vessel. It appears that he attempted nothing because he had persuaded himself that nothing could be done, and that he rejected all offers of assistance, not after weighing the measures proposed, but because he had hastily determined that the state of his vessel would make every effort to save her unavailing. Their Lordships therefore agree in the conclusion to which the Registrar and Merchants arrived, as to the master having shown want of ordinary nautical skill and neglect of duty, and they think that the witnesses produced before the Judge by the respondents did not alter the case, and that the learned Judge ought to have confirmed the report so far as it limited the damages to the immediate consequences of the collision. But they agree with the learned Judge in his objection to the conjectural estimate of the measure of damages made by the Registrar and Merchants. They ought not to have formed any judgment as to the reduced damages except upon the evidence of witnesses. By which of the parties these witnesses should have been produced was made a question in the course of the argument. It seems clear that the respondents could not have been expected to be prepared with proof of this description upon the reference. They claimed the entire value of the vessel and cargo *minus* the amount of the proceeds of what had been sold, and they could not know that the Registrar and Merchants would reject that claim before their report was made. On the other hand, the appellant contended that the respondents were not entitled to damages beyond those which could be attributed solely to the collision, and the proof of the amount of those limited damages would seem more properly to have been a part of their case. But no evidence at all having been given, their Lordships think that the Registrar should have reported to the Judge his opinion that the appellant was responsible only for the damages directly occasioned by the collision, and not for any which happened after the refusal of the master of the respondents' vessel to accept the assistance which

was offered to him, and that as to the amount of those limited damages no evidence had been given. If the Judge had adopted the view of the Registrar he would have confirmed the report, but referred the matter back to the Registrar to ascertain the damages upon that footing, and then the onus of proving the amount to which the respondents would be entitled upon this restricted view of their claim would have fallen upon them.

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Their Lordships upon the whole of the case will humbly advise her Majesty that the decree appealed from should be reversed, except so far as it condemned the respondents in the costs incurred on the reference before the Registrar and Merchants; that the cause be retained, and that it be referred back to the Registrar, assisted by Merchants, to ascertain the amount of the damages to which the respondents are entitled down to the time when the master of the *Willem Eduard* first refused the assistance which was offered to him, and that there should be no costs of the appeal on either side.

Decree reversed, and a new reference ordered to the Registrar and Merchants to assess the damages down to the time when the master first refused assistance.

The parties subsequently agreed to adopt the Registrar's original report and to take the sum of 1,100*l.* mentioned therein as the true measure of damages.

Townsend, proctor for the appellant.

Deacon, proctor for the respondents.

NOTE.—As to the right allowed the plaintiffs in this case to recover the original partial damages, compare *Knight v. Faith*, 15 Q. B. 649.

The supervening total loss was here apparently regarded as being wholly occasioned by the plaintiffs' own default, and completely foreign to the cause of action. But if it had been considered, which it might not unreasonably have been, as occasioned partly by the original negligence of the defendant, and partly by the ensuing default of the master of the Dutch ship, the question would have arisen, whether the plaintiffs were entitled to recover half the total loss, according to the Admiralty rule of dividing the damages in cases where both parties are to blame. It must be immaterial whether the contributory negligence of the plaintiff occurs before or after the negligence of the defendant, *Vaux v. Sheffer*, 8 Moore, P. C. 87; and the technical objection to permitting under a general decree for damages one portion of the damages to be reckoned at their full amount, and another portion, so to speak, of the damages to be reckoned at only half their amount, might be overruled. But a distinction might be drawn between negligence which contributes to the collision and negligence subsequently arising which contributes to ulterior damages, on the ground that the Admiralty rule should be strictly confined to that class of cases in which it has in practice been applied. The normal case for its application is where the owner of a ship sues in the Admiralty Court to recover damages accruing to his ship from a collision with another ship, which collision proves on inquiry to have taken place through the improper management of both

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ships. This rule—truly called *arbitrium rusticum*—which is peculiar to our own Admiralty Courts, may have been designedly created from a notion of its own merits—the supposed equity, where each is proved to have been to blame for the cause of loss, of dividing equally between the parties the loss which otherwise might fall unequally. It was more probably, however, a corruption of a similar rule which still prevails in most European codes (see *Laconia*, *arguendo*, ante, p. 133), but is not allowed in our Admiralty Court, of dividing damages in cases where the cause of the collision is left after investigation in utter ambiguity. This latter rule, which is equally opposed to principle, may have arisen from the peculiar difficulty so often experienced in ascertaining the real parties to blame for a collision between ships at sea.

The Admiralty rule above mentioned is not merely anomalous, but is in direct conflict with the common law, and occasionally produces startling results, as when a collision having taken place, one shipowner, say A., sues the other, B., in the Admiralty Court, and is sued by B. in turn in one of the common law courts, and each tribunal considers both parties to blame. A. recovers half his damages, B. recovers nothing! (See also *Aurora*, Lushington, p. 327.) The rule in question has, however, as regards the rights of shipowners in such case, been affirmed to be the law of the Admiralty Court, both by the House of Lords and the Privy Council, *Hay v. Le Neve*, 2 Shaw's Scotch Appeals, 395; *Vaux v. Sheffer*, 8 Moore, P. C. 75. The Admiralty Court has also in a single decision (*Milan*, Lushington, 388), which might have come under review in the present case, extended its application to the case where the plaintiff, being the owner of cargo which is carried in one ship, sues the opposing ship for damages occasioned by a collision, which proves to have been brought about by the negligent navigation of both ships. No opportunity has yet offered of extending it to other cases in the Admiralty Court, though such might any day occur under the newly-granted jurisdiction. Thus if the owner of cargo, carried in a foreign ship, were to sue such ship for loss occasioned by the negligence of the shipowner, the case proving that his negligence consisted in improper navigation of the ship resulting in a collision with another ship also improperly navigated, or if it was proved that the loss (not by collision) was occasioned by the default of the plaintiff or the shipper as well as by that of the shipowner. The increasing conflict of the rule with the common law applicable to these and all other cases of negligence, thus threatens to become hardly tolerable. When the whole subject passes, as one day it must, under legislative review, this anomalous Admiralty rule, notwithstanding its equitable or seemingly equitable operation in some cases, may, it is to be hoped, disappear altogether.

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THE HERO.

Amendment of Præcipe—Increase of Action.

The præcipe to institute an action having been by mistake entered in a smaller sum than that intended, the defendant's ship was arrested and bailed in that sum. On the mistake being discovered before the hearing of the cause, the Court gave permission (on payment of costs occasioned by the mistake) for the præcipe to be amended, and the defendant's ship to be re-arrested.

COLLISION.—This was a motion made on the 28th April, 1865, on behalf of the plaintiffs, the owners of the ship *Albertus* and her cargo, for leave to amend the præcipe instituting the cause, by altering the sum in which the action was entered from 1,000*l.* to 2,600*l.*, and to decree a warrant for the re-arrest of the ship *Hero*.

In support of this motion was filed an affidavit by the plaintiffs' proctor and his clerk, by which it appeared that the clerk had on the 15th August, 1864, by mistaking his instructions, filled in the original præcipe for instituting the action with the figures 1,000*l.* instead of 2,600*l.*; that the ship *Hero* was accordingly arrested and bailed in that sum; that the error was not discovered until the 21st April, 1865; that the damages were estimated at 2,350*l.*; and that the gross register tonnage of the *Hero* was 602 tons.

The defendants had originally appeared under protest to the action. Before the date of this motion the proceedings on protest had been concluded, an absolute appearance given, and the plaintiffs' petition filed.

Clarkson, for the plaintiffs, in support of the motion, referred to the *Temiscouata* (a) and the *Mæander* (b).

Deane, Q.C., contra, referred to the *Kalamazoo* (c) and *Wild Ranger* (d).

Cur. adv. vult.

DR. LUSHINGTON.—I have considered the cases which were Judgment.
cited to me on the hearing of this motion: *Kalamazoo* (e),

(a) 2 Spinks, 208.

(b) Ante, p. 29.

(c) 15 Jurist, 885.

(d) Ante, p. 84.

(e) 15 Jurist, 885.

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Temiscouata (a), *Mæander* (b), *Wild Ranger* (c). In the *Kaluzoo* and the *Wild Ranger* are expressions which, literally interpreted, would indicate that I have no power to grant a re-arrest for the same cause of action after the property has been released on bail: but those expressions must be read subject to the fact which formed the ground of the decision in each of those cases, that the cause of action had passed into *res judicata*. I am of opinion that where application to increase the amount of the action is made before judgment has been pronounced, the Court has power to direct measures to be taken to do full justice to the plaintiff.

I am of opinion, therefore, that the Court has power to grant this motion, and that under the circumstances it is just and proper that the plaintiffs should be relieved from the mistake committed. I allow the re-arrest, but the plaintiffs must pay all the expenses arising from their mistake.

Clarkson, Son & Cooper, proctors for the plaintiffs.

Coote, proctor for the defendants.

(a) 2 Spinks, 208.

(b) Ante, p. 29.

(c) Ante, p. 84.



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In the Privy Council.

Present—THE LORD CHANCELLOR.

LORD JUSTICE KNIGHT BRUCE.

LORD JUSTICE TURNER.

SIR JOHN T. COLERIDGE.

SIR EDWARD VAUGHAN WILLIAMS.

THE MARIE JOSEPH (a).

Negotiability of Bills of Lading—Stoppage in transitu—Effect of Fraud—Deposit of Bills of Lading with Banker “for Advances past or future.”

If the vendee of goods having received from the vendor an indorsed bill of lading making the goods deliverable to order or assigns, indorses and delivers it to a banker as a security for past and future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods in transitu.

The vendee of goods having received from the vendor an indorsed bill of lading making the goods deliverable to order or assigns, and having given an acceptance for the price, returned the bill of lading to the vendor, to hold “as security against the acceptance until the goods are sold or the vessel arrives,” and afterwards by fraudulent representation again obtained possession of the bill of lading from the vendor, and negotiated it by indorsement and delivery to a third person, who took without notice of the fraud :

Held, reversing the judgment of the Admiralty Court, that the vendee's fraud did not vitiate his power to pass a good title by indorsement, and that the right of such third person under the indorsement should prevail against the claim of the unpaid vendor to stop the goods in transitu.

The vendor's agent, Stericker, delivered to the vendees, a firm consisting of two persons called Scarborough & Tadman, a bill of lading for linseed cake indorsed by the vendors, making the goods deliverable to order or assigns, and took an acceptance for the price. Afterwards, at the same interview, the vendees returned the bill of lading to Stericker, to hold “as security against the acceptance, until the cakes are sold or the vessel arrives.” Subsequently Tadman, by falsely representing to Stericker that he had sold the goods to one Croysdale, re-obtained from him possession of the bill of lading, and then indorsed it in the name of his firm to a bank as security for past or future advances. The bank took without notice of the fraud. They afterwards advanced to the firm a sum less than the value of the linseed cakes ; but the total amount of their debt was greater :

Held, reversing the judgment of the Court of Admiralty, that Tadman's fraud did not vitiate his power to pass a good title to the bill of lading, and that the claim of the bank upon the goods (for the whole of their debt) prevailed over the claim of the unpaid vendor to stop in transitu.

Gurney v. Behrend, 3 E. & B. 622 ; *Kingsford v. Merry*, 11 Exch. 577 ; 1 H. & N. 503, considered (b).

THIS was an action brought in the Admiralty Court under the 6th section of the stat. 24 Vict. c. 10, by Messrs. Peases, Hoare & Pease, bankers at Hull, as indorsees of a

(a) This appeal was twice argued. (b) See also *Coxe v. Harden*, 4 East, 211.

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bill of lading for certain linseed cake, against the foreign ship Marie Joseph, for breach of duty by the master in not delivering the cake to them.

The action was defended by the master, who had delivered the cake under an indemnity to Messrs. Maxwell & Dreossi, the original shippers, who had claimed to stop in transitu.

The facts proved at the trial were thus stated by Dr. *Lushington* in his judgment:

Early in the month of February, 1864, Walter Stericker, of Kingston-upon-Hull, as agent for Messrs. Maxwell & Dreossi of Bordeaux in France, agreed with Messrs. Scarborough & Tadman of Kingston-upon-Hull for the sale to them of sixty tons of linseed cake, they paying for the same by their acceptance at three months' date. The linseed cake was accordingly on the 11th February shipped at Bordeaux by Maxwell & Dreossi on board the Marie Joseph, owned and commanded by Jean Marie Gloahec. Messrs. Maxwell & Dreossi indorsed the bill of lading for the same unto order or assigns and drew a bill of exchange for the price of the linseed cake on Messrs. Scarborough & Tadman, and forwarded both the bill of lading and the bill of exchange to Stericker, their agent. On the 16th February, 1864, Stericker brought both the bill of lading and the bill of exchange, and also a policy of insurance upon the linseed cake, to the office of Scarborough & Tadman. Mr. Scarborough, one of the members of the firm, accepted the bill of exchange, and thereupon Stericker delivered to him the bill of lading, duly indorsed as mentioned by Maxwell & Dreossi, together with the policy of insurance. A conversation then took place in which some mention was made by Stericker respecting the implication of the firm of Scarborough & Tadman in the affairs of one David Moor, which affairs since the preceding Christmas had been rumoured to be embarrassed. Thereupon Mr. Scarborough said: "Let him" (Stericker) keep the bill of lading." Accordingly, Scarborough handed back the bill of lading and the policy to Stericker, and Stericker signed and gave to Scarborough a receipt for the same in the following terms:—

"Hull, 16th February, 1864. Memorandum that I have received of Messrs. Scarborough & Tadman, of Hull, a bill of lading and policy of assurance for about sixty tons of linseed cake shipped ex Marie Joseph, dated at Bordeaux, 11th February, 1864, and which I hold as security against their acceptance of Messrs. Maxwell & Dreossi's draft for 427*l.* 1*s.* 4*d.*, due on the 14th May, 1864, until the cakes are sold or the vessel arrives. WALTER STERICKER."

On the 18th February, 1864, Mr. Walter Tadman, the other member of the firm of Scarborough & Tadman, called on Stericker, and stated to him that his firm had sold the linseed cake to a Mr. Croysdale, who would accept a bill of exchange against the bill of lading, and Mr. Tadman asked for the bill of lading. Trusting to this representation, Stericker returned the bill of lading to Tadman. The representation was untrue; no such sale had taken place. On the same day, the 18th of February, but shortly afterwards, Messrs. Pease & Co., the plaintiffs, bankers in Hull, sent a message to the office of Scarborough & Tadman, requesting one of the members of the firm to call upon them at the bank. No reason for the request seems to have been given with the message, but Messrs. Scarborough & Tadman could not fail to know it was respecting their account with the bank. It appears that on the 18th of January preceding, Messrs. Scarborough & Tadman owed the bank 1,985*l.*, and were liable on bills which the bank had discounted, and which were running to the extent of 4,847*l.*, whilst the bank held security only for 850*l.* On the 18th of February the debt had been reduced to 1,187*l.*, but the discount liabilities still amounted to 4,000*l.* or thereabouts.

Upon receipt of the message, Mr. Tadman went to the bank, and took with him the bill of lading, and also some warrants for some rib grass. There he saw Mr. Arthur Pease, a member of the banking firm. Mr. Pease asked him to reduce the debt of the firm, but did not ask him for security. Tadman thereupon offered to him as a security the bill of lading, the policy of insurance, and the warrants, and this offer Mr. Pease accepted. Tadman then indorsed the bill of lading in the name of his firm, and delivered it with the other documents to Mr. Pease, and a memorandum was drawn up in the following, which was the usual form:—

“Hull, Feb. 18, 1864.

“Messrs. Peases, Hoare & Pease,

“Gentlemen, herewith we beg to hand you warehouse warrant for thirty-nine sacks rib grass, and a bill of lading for sixty tons linseed cake in bulk per Marie Joseph, and policy of insurance, as a security for advances now made or that may hereafter be made on our account, and we hereby give you authority to sell the above goods, placing the proceeds to our credit in account.”

This memorandum was not signed by Mr. Tadman, in consequence, as it was sworn, of a mere oversight. Mr. Pease also deposed that at the date of this transaction he did not know the history of the bill of lading, but assumed the bill of lading to be,

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as it purported, the lawful property of Scarborough & Tadman, that he had no suspicion that Scarborough & Tadman were insolvent or on the eve of insolvency, though he knew through the banking account that they were mixed up with the dealings of Mr. Moor. Mr. Moor did not become bankrupt till the 4th of March, and on the 7th March, Scarborough & Tadman also stopped payment. On the 5th of March however, most probably in consequence of Moor's bankruptcy having been communicated from Hull or from other information, Messrs. Maxwell & Dreossi telegraphed to Stericker to stop the delivery of the linseed cakes, and announced that a bill of lading indorsed to Stericker would be sent by the same post. This was accordingly done, and on the 7th of March Stericker received a bill of lading, being a duplicate of the one indorsed to Scarborough & Tadman, except that it was indorsed to him, Stericker. The vessel arrived in Hull on the 5th of April; a water clerk came on board first, and told the captain that he thought two persons claimed the cargo, and advised him to be careful. He was shortly afterwards followed by Johnson, the clerk of the solicitors to the plaintiffs Pease & Co., who presented the bill of lading held by the plaintiffs and claimed the cargo. When it was first presented, it was not indorsed by Messrs. Pease & Co., the plaintiffs:—in fact, it was not indorsed till the 7th. On the same day, the 5th, but later, Stericker came on board and presented his bill of lading, and eventually obtained possession of the cargo, the captain receiving an indemnity from Maxwell & Dreossi.

On the 9th April, Messrs. Pease commenced this action. The bank, after the indorsement of the bill of lading to them by Tadman, made some further advances to his firm to the amount of 26*l.*, before they stopped payment, and at the dates of the stoppage in transitu and action brought, the debt of Scarborough & Tadman to the bank much exceeded the value of the linseed cake in question, and the securities deposited by them with the bank.

The *Queen's Advocate* (Sir *R. Phillimore*) and *Clarkson*, for the plaintiffs.—By the indorsement of the bill of lading by Tadman, on account of the vendees to the plaintiffs, the right of the unpaid vendors Maxwell and Dreossi, to stop in transitu, was concluded: *Lickbarrow v. Mason* (a); *Re Westzinthus* (b); *Spalding v. Ruding* (c).

Deane, Q.C., and *Butt*, for the defendant.—The right to

(a) 1 Smith's L. C. 681.

(b) 5 B. & Ad. 817.

(c) 6 Beav. 376.

stop in transitu, we submit, remained. The indorsement of the bill of lading by Tadman to the bank was invalid against the claim to stop in transitu: 1st, because no present consideration was given by the bank. The delivery of the bill of lading was simply an authority to sell on account of the depositors: *Patten v. Thompson* (a). The case cited of *Spalding v. Ruding* (b), determines that against the owners and shippers of the goods entitled to stop in transitu, the vendee's pledgees, though having a general balance due to them, have not a right, by virtue of the bill of lading, to retain more than the consideration they paid for the advantage which the bill of lading gave them. This decision is quoted as an authority on this point by the editor of Smith's Leading Cases, p. 747. 2ndly, because the indorsement to the bank was a fraudulent preference; and 3rdly, because the bill of lading had been obtained by Tadman from Stericker by fraudulent misrepresentation, and Tadman could not convey a good title: *Gurney v. Behrend* (c). Tadman was a vendee, not a factor, therefore the plaintiffs cannot rely on the Factors' Act.

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The *Queen's Advocate* in reply.—It cannot be really contended that a banker taking bills of lading to secure an account current does not take for valuable consideration, or that Messrs. Pease in this case took the bill of lading with any knowledge of Scarborough & Tadman's insolvent condition. The real question is, whether their title is invalidated by reason of Tadman having re-obtained possession of the bill of lading by fraud. Upon this it is to be observed, that the property in the bill of lading passed to Tadman by the indorsement and delivery by Stericker, and that the subsequent re-delivery of the bill of lading to Stericker, gave Stericker only an equitable lien. We submit, therefore, that Tadman could convey a legal title to the bank.

DR. LUSHINGTON [after stating the facts as above].—The question raised is, whether Messrs. Maxwell & Dreossi had a right to stop in transitu as against Messrs. Pease & Co., the plaintiffs. This question may at once be cleared of any difficulty occasioned by the second bill of lading indorsed to Stericker. That bill was made and indorsed long subsequently to the indorsement of the first bill of lading by Tadman to the plaintiffs. If Messrs. Maxwell & Dreossi had a right to stop in transitu, they did not, in order to exercise it, require another bill of lading. If the first bill of lading, immediately upon the

10 Nov., 1864.
Judgment.

(a) 5 M. & S. 356.

(b) 6 Beav. 381.

(c) 3 E. & B. 622, 633.

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delivery of it to Scarborough & Tadman, had been at once indorsed by them for a valuable consideration to Messrs. Pease & Co., without the intermediate processes of the bill being returned by Scarborough to Stericker, and again returned by Stericker to Tadman, Messrs. Maxwell & Dreossi would have lost their right to stop in transitu as against the bank. This is perfectly clear upon the authority of *Lickbarrow v. Mason* and other cases. The defendants, however, without disputing (which would be impossible) the authority of *Lickbarrow v. Mason*, deny its applicability in the present instance. The argument is that the indorsement to Pease & Co. of the first bill of lading was not an indorsement for valuable consideration. Now the consideration averred by Messrs. Pease is to cover, in a banking account, past advances and also advances in future. I cannot doubt but that this, in the view of the law, is a valuable consideration, and I know from undoubted authority that it is customary for bills of lading to be given to cover such banking accounts, and no suspicion exists as to the validity of such transactions.

The cases cited have really no bearing on the present case. Reliance is placed on the case of *Patten v. Thompson* (a), and upon the rule which holds good even under the late Factors' Acts, that a factor known as a factor cannot pledge goods entrusted to him as a security for past advances made to himself, such mode of dealing being plainly incompatible with his fiduciary character. In the present case, the bill of lading was undoubtedly delivered as a security for such past advances. But Scarborough & Tadman were not factors, they were owners, and were dealt with as such by the bank. The same case of *Patten v. Thompson*, and the case of *Spalding v. Ruding* (b), and *Re Westzinthus and Others* (c), plainly show that the pledge of a bill of lading as a security to a bank for past advances, if made by the owner or by a factor, with authority to make such pledge, takes precedence over the right of the vendor to stop in transitu. Another objection was also made, that this indorsement, if for valuable consideration, was nevertheless invalid, because fraudulent against creditors of Scarborough & Tadman. But to use the words of the judgment in *Van Casteel and Others v. Booker* (d), "to defeat a payment or transfer made to a creditor, the assignees must show it be fraudulent as against the body of creditors, by proving it to be voluntary on the part of the bankrupt, and in contemplation of bankruptcy; and if it is

(a) 5 M. & S. 350.

(b) 6 Beav. 376.

(c) 5 B. & Ad. 817.

(d) 2 Exch. 706.

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made in consequence of the act of the creditor it is not voluntary." Now in the present case it has not been shown that the indorsement of the bill of lading was made by Tadman in contemplation of bankruptcy. Mr. Pease swears he did not suspect the firm of Scarborough & Tadman to be insolvent, and on the contrary it is shown that it was made in consequence of the act of Mr. Pease, for Mr. Pease pressed for a reduction of the debt of the firm, and it was only upon that that Tadman offered the bill of lading as a security. On these grounds it seems to me clear that, if Scarborough & Tadman had, immediately upon receiving the bill of lading, indorsed it to Pease & Co., the vendors would have lost their right to stop in transitu as against the lien of the bank.

But there is another most important fact to be considered. The bill was returned to Stericker, and obtained back from him by a fraudulent representation on the part of Mr. Tadman, and he, being so fraudulently possessed of it, transfers it to Messrs. Pease. In the case of *Gurney v. Behrend* (a), Lord Campbell points out the distinction between a bill of lading and a bill of exchange. He says:—"Primâ facie the defendants had a right to stop the wheat on 2nd February, for it was still in transitu, and they were unpaid owners. The onus lies on the plaintiffs to prove that they had become the owners, and that the right to stop in transitu was gone. For this purpose it is not enough that they had become bonâ fide holders of the indorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bonâ fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent bonâ fide transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." This case is also cited in Maclachlan on Shipping, p. 343. Applying this doctrine to the present case, the bill of lading was obtained back from Stericker by Tadman upon false representations, by fraud. It was then negotiated without Stericker's consent, or the consent of the vendor, and contrary to the understanding between Stericker and Tadman.

(a) 3 El. & Bl. 633.

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This fraudulent conduct of Tadman then invalidated the indorsement to Pease & Co.; and, although quite innocent of any participation in it, they must unfortunately bear the consequences.

I pronounce against the plaintiffs of necessity, with costs.

From this judgment the plaintiffs appealed.

Mellish, Q.C., and *Clarkson*, for the appellants.

We submit that the case must be governed by the general rule declared in *Lickbarrow v. Mason* (a), that a negotiation of the bill of lading by the vendee to a third person for value defeats the right of the vendor to stop the goods in transitu. It is immaterial that the bank took the bill of lading only by way of security for advances. They took without notice of any fraud, and gave good consideration, as the Court below decided; the deposit of the bill of lading being, as respects the past advances, a mode of conditional part payment. The equitable doctrine laid down in *Re Westzinthus* (b) does not give a right to stop in transitu; and, moreover, does not apply in the circumstances of this case, because the debt to the bank exceeded the value of the goods. The judgment, however, pronounces that the rule of *Lickbarrow v. Mason* did not apply, because Tadman, who pledged the bill of lading to the appellants, had obtained possession of it by fraud. The learned Judge proceeded upon the doctrine stated by Lord Campbell in *Gurney v. Behrend* (c): "Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bonâ fide transferee for value cannot make title under it, as against the shipper of the goods." But the facts of this case are different from the circumstances there put. Here the bill of lading was neither stolen, nor transferred without authority of the holder. Messrs. Scarborough & Tadman were the owners of the linseed cake by the original indorsement of the bill of lading, and although, after the deposit of the bill of lading with Stericker, Tadman re-obtained the bill of lading from Stericker by fraudulent representation, he did not obtain it without Stericker's authority, but with his authority or rather by Stericker's own act; and for the very purpose of disposing of it. It is true that Stericker did not

(a) 1 Smith, L. C. 681.

(c) 3 E. & B. 633.

(b) 5 B. & Ad. 817.

intend that Tadman should take it to the bank, but that is immaterial. Stericker voluntarily gave Tadman the documents of title, and thus gave him the power of disposing of the goods. The doctrine is settled that, if a man induces by fraud the owner of goods to sell them to him, he may make a good title against the original owner to a third party who is innocent of the fraud; *White v. Garden* (a); the principle being this, that when one of two innocent parties must suffer, the loss should fall on him who enabled the third person to commit the fraud; *Dyer v. Pearson* (b). *Stevenson v. Newnham* (c) was a case of a bankrupt transferring goods by way of fraudulent preference, and Baron Parke, delivering the judgment of the Exchequer Chamber, there said:—"We entirely agree with the learned Chief Justice and the Court of Common Pleas that the effect of this, as of ordinary frauds, is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable, at the option of the party defrauded. The fraud only gives a right to rescind. In the first instance the property passes in the subject matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is voidable between the original parties. This was decided in the recent case of *White v. Garden* (d), and had been so before in *Parker v. Patrick* (e); in 1 Sumner's Reports of Mr. Justice Story's decisions, 301; and by Lord Kenyon, in *Wright v. James* (f); and see *Load v. Green* (g); and *Campbell v. Fleming* (h). It must be considered, therefore, as established, that fraud only gives a right to avoid a contract or purchase; that the property vests until avoided; and that all mesne dispositions to persons not parties to or at least not cognisant of the fraud, are valid." The same doctrine was declared in the judgment of the Court of Exchequer, in *Kingsford v. Merry* (i), where the plaintiffs had sold goods to one Ellis, and one Anderson fraudulently got a resale of the goods from Ellis in the name of another firm, and by further fraudulent representations obtained the goods from the plaintiffs and pledged them to the defendant: "We apprehend it is quite clear that when a vendee obtains possession of a chattel, with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has

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(a) 10 C. B. 919.

(b) 3 B. & Cr. 42.

(c) 13 C. B. 285.

(d) 10 C. B. 919.

(e) 5 T. R. 175.

(f) 4 Esp. 82.

(g) 5 M. & W. 219, 221.

(h) 1 A. & E. 40.

(i) 11 Exch. 579.

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done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor." The judgment in that case was reversed in the Exchequer Chamber; but upon the ground that there was no relation of vendor and vendee between the person who parted with the possession of the goods, and the person who obtained possession by the fraud, and therefore no contract between them, which the former might affirm or disaffirm. That reason does not apply here where the parties are vendor and vendee. Our case is as if Tadman's fraudulent misrepresentation had preceded the original indorsement and delivery, and he had immediately negotiated the bill of lading with the bank, in which circumstances, according to the authorities cited, the bank would undoubtedly have taken a good title. If necessary, however, we would say that Tadman was intrusted with the bill of lading as agents to Maxwell & Dreossi, and in that case we should rely on the first section of the 5 & 6 Vict. c. 39, which provides that "any agent who shall be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent, &c."

Deane, Q.C., and Swabey, for the respondents.

The judgment of the Court below was correct. Tadman, we submit, could not in the circumstances pass a good title in the goods to the bank. The decisions quoted by the appellants, such as *White v. Garden* (a), and the judgment of the Court of Exchequer, in *Kingsford v. Merry* (b), do not apply. Here no contract was obtained by fraud. The fraud was not in the original contract of sale, but in regaining possession of the bill of lading from Stericker by false representations. The doctrine, therefore, of the Exchequer Chamber, in *Kingsford v. Merry* (c), would seem to apply. There was no contract to affirm or disaffirm. The mere consent of Stericker, so obtained by fraud to Tadman taking possession of the bill of lading, was immaterial: it was the same as if Tadman had stolen the bill of lading. The case of *Newsom v. Thornton* (d) is an authority in point.

(a) 10 C. B. 919.

(b) 11 Exch. 577.

(c) 1 H. & N. 503.

(d) 6 East, 17.

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There the plaintiffs, merchants in Cork, had consigned pork to Church, a merchant in London, on joint account of themselves and Church, and sent him a bill of lading, making the pork deliverable to him or his assigns. Church was indebted to the defendants, and, being about to leave London for Ireland, "agreed with the defendants, in consideration of a further advance, to leave with them an order upon one Cole, who was his clerk, to indorse and deliver to them the bill of lading for the pork when it arrived. And, in consequence, upon his departure he left word with Cole that in case money was wanted during his absence he should apply to the defendants for it, and was to indorse and deliver to them the bill of lading when it arrived. After Church's departure, Cole, who had received the bill of lading, applied to the defendants for an advance of 500*l.* and upwards for Church, which they refused, but nevertheless contrived to obtain from him the bill of lading with his indorsement, he not being fully apprised of the agreement between them and his master, and understanding from them that immediately previous to Church's departure for Ireland, they had made another advance to him upon promise of this assignment." Lord Ellenborough, in giving judgment, page 40, said: "As there was no consideration paid for that bill of lading by the defendants, they not having in fact made any advance upon it, as they had engaged to do, and upon the faith of which it was agreed to be deposited with them, there was nothing to divest the original right subsisting in the consignors to stop the goods in transitu, upon the insolvency of the consignee, who remained debtor for them."

2ndly. The appellants can derive no benefit from the Factors' Act, for Scarborough & Tadman were not "agents:" they were the owners of the goods.

3rdly. The appellants were aware, at least to some extent, of the pecuniary difficulties of Scarborough & Tadman: and it is submitted that on this account their right ought to give way to the right of the unpaid vendor, *Cuming v. Brown* (a).

4thly. It appears that the bill of lading was pledged with the bank to cover past advances: the agreement provided for future advances also, but in point of fact no such advances were made, except the trifling sum of 26*l.* In these circumstances the ruling of Lord Langdale, in the case of *Spalding v. Ruding* (b), would apply: "Even if the defendants were entitled to be considered as factors of Thomas (the vendee) having a balance due to them, it does not appear to me that as against the plaintiffs, the owners and shippers of the goods entitled to stop in transitu, they could,

(a) 9 East, 506.

(b) 6 Beav. 381.

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by virtue of this bill of lading, have a right to retain more than the consideration they paid for the advantage which the bill of lading gave them." In the note to *Lickbarrow v. Mason*, the Editors to Smith's Leading Cases say, p. 747: "This case shows that the goods cannot be retained as security for a general balance of account, but only for the specific advance made upon security of the bill of lading."

Clarkson replied.

Judgment.

THE LORD CHANCELLOR.—The question raised by the suit is the right of the shippers of the linseed cake to stop the same in transitu, under the following circumstances:—

Facts of the
case.

In February, 1864, Messrs. Maxwell & Dreossi, of Bordeaux, through their agent, Walter Stericker, sold to Messrs. Scarborough & Tadman, of Hull, sixty tons of linseed cake at 7*l.* 12*s.* 6*d.* per ton, payable by bill at three months from the date of the bill of lading. On the 11th of February the goods were shipped on board the Marie Joseph at Bordeaux, by Maxwell & Dreossi, and a bill of lading for the same was signed by the respondent, the master. Maxwell & Dreossi indorsed the bill of lading to order and assigns, and drew a bill of exchange for the price on Messrs. Scarborough & Tadman, and sent the bill of lading and bill of exchange to their agent, Stericker. On the 16th of February, Stericker took the bill of lading and the bill of exchange to Scarborough & Tadman, when the bill was accepted by Scarborough, and Stericker thereupon indorsed the bill of lading and delivered it to Scarborough, together with a policy of insurance which had been effected upon the goods. A conversation then ensued between Stericker and Scarborough respecting the dealings of Scarborough & Tadman with a person named Moor, whose circumstances were supposed to be embarrassed, and Stericker asked Scarborough whether he had any objection to his holding the bill of lading. Scarborough told Stericker to take it, and delivered back the bill of lading to Stericker, who thereupon signed the following memorandum:—

“Hull, 16th February, 1864.

“Memorandum that I have received of Messrs. Scarborough & Tadman, of Hull, a bill of lading and policy of insurance for about sixty tons of linseed cakes, shipped Marie Joseph, dated at Bordeaux, 11th February, 1864, and which I hold as security against their acceptance of Messrs. Maxwell & Dreossi's draft, for 427*l.* 1*s.* 7*d.*, due the 14th May, 1864, until the cakes are sold or vessel arrives.”

On the 18th February, Tadman, the other partner in the firm of Scarborough & Tadman, called upon Stericker, and stated to him that his firm had sold the linseed cake to a Mr. Croysdale, who would accept a draft against the bill of lading. The linseed cake had not been sold to Croysdale, nor to any other person. Trusting to this misrepresentation, Stericker returned the bill of lading and the policy of insurance to Tadman. On the same day, after thus obtaining the bill of lading, in consequence of a message received from the appellants, Messrs. Pease & Co., bankers, in Hull, to whom Scarborough & Tadman were largely indebted, Tadman went to the bank, and Mr. Pease called his attention to the state of his account and to the amount of the bills under discount, and asked him for security. Tadman thereupon indorsed the bill of lading in the name of his firm, and delivered it, together with the policy of insurance, to Mr. Pease, and gave Messrs. Pease & Co. an unsigned memorandum authorising them to sell the linseed cake and to place the proceeds to the credit of Scarborough & Tadman, on account. Moor, in whose transactions Scarborough & Tadman were supposed to be involved, became bankrupt on the 4th of March; and on the 7th of March, Scarborough & Tadman stopped payment. On the 5th of March a telegram was received from Maxwell & Dreossi to Stericker, directing him to stop the delivery of the linseed cake, and on the 7th of March he received from Maxwell & Dreossi a bill of lading indorsed to himself. The Marie Joseph arrived at Hull on the 5th of April. The linseed cake was demanded on behalf of the appellants upon the bill of lading indorsed to them, but Stericker afterwards went on board and presented his bill of lading, and obtained possession of the goods under an indemnity from Maxwell & Dreossi to the respondent. Upon these facts the learned Judge of the Court of Admiralty was of opinion that the bill of lading having been obtained from Stericker by the false representations and fraud of Tadman, and having afterwards been negotiated without the consent of Stericker, or of his principals, and contrary to the understanding between Stericker and Tadman, the fraudulent conduct of Tadman invalidated the indorsement to Pease & Co., and he accordingly pronounced against them.

The question is one of nicety and difficulty, and, as was stated by the counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right determination. A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the

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of bills of
lading; *Gurney*
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Scarborough & Tadman, by the indorsement to them of the bill of lading, acquired the property in the goods. The return by them of the bill of lading to the vendor simply gave him a right to hold it temporarily according to the agreement of deposit.

indorsee, subject only to the right of an unpaid vendor to stop them in transitu. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonoured, provided the indorsee for value has acted *bonâ fide*, and without notice. Although a bill of lading is a negotiable instrument, it is only as a symbol of the goods named in it, and, as was said by Lord Campbell, in *Gurney v. Behrend* (a), "although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority; and if it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it as against the shipper of the goods." This dictum is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods, having obtained a bill of lading, indorsed it to order and assigns, and forwarded it to Stericker for the express purpose of its being indorsed by him and handed over to Scarborough & Tadman. By the indorsement and delivery to Scarborough & Tadman, they acquired the complete property in the goods and control over the bill of lading, subject only to the right of Maxwell & Dreossi to stop in transitu as long as it remained in their hands. This is not denied by the respondent; but his case is, that Scarborough & Tadman having, after the indorsement and delivery of the bill of lading, returned it to Stericker to retain as a security for the payment of the bill of exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to Pease & Co., at least without being subject to the lien created by the deposit with Stericker, and consequently that the right to stop in transitu against Pease & Co., though *bonâ fide* indorsees for valuable consideration, still subsisted. There can be no doubt that, although the vendors had parted with the property in the bill of lading by the indorsement to Scarborough & Tadman, they acquired a title to hold it by the terms of the agreement under which it was deposited with Stericker. These terms do not include any stipulation that the vendees should not so deal with the bill of lading as would, in the event of their insolvency,

(a) 3 El. & Bl. 634.

defeat the right to stop in transitu. It is not even stipulated that the vendors should hold the bill of lading till the sub-vendees should give them a bill of exchange or other security for payment. The bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods.

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Scarborough & Tadman had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors, by keeping the bill of lading in their hands, might have prevented Scarborough & Tadman from dealing with it. They chose to deliver it back to them, induced to do so, indeed, by the fraudulent representation of Tadman, but still consenting to their possession of it. The indorsees acquired no new title from the vendors by the fraud which Tadman practised, but merely obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owners of it, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold a bill of lading as a security. As in the case of lien, so in this case as long as the bill of lading remained with the parties who has fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. This is a much stronger case than that put by Abbott, C. J., in *Dyer v. Pearson* (a), of the real owner of goods who suffers another to have possession of his property and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the person entitled to retain the possession of the instrument which represented the goods against the real owners, relinquished the possession of it to them, and enabled them to deal with the property in their true character of owners. In the case of *Kingsford v. Merry* (b), it was held that, "when a vendee obtains possession of a chattel, with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction, and the legal

The vendor being induced by fraud again gave possession of the bill of lading to the indorsees; and thus enabled them to deal with the goods in their true character of owners. The indorsees then indorsing and delivering the bill of lading to the bank for good consideration, the bank thereby acquired a right in the goods, which defeated the vendor's right to stop in transitu.

Dyer v. Pearson.
3 M.

Kingsford v. Merry.

(a) 3 B. & C. 42.

(b) 11 Exch. 577.

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consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

Although this case was reversed in the Exchequer Chamber(*a*), yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because, in the judgment of the Court, the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property.

An ownership, which was at the time perfect at law, though voidable as to part, viz. the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the interim protected by the interposition of a bonâ fide purchaser for valuable consideration.

Decree reversed with costs.

For these reasons their Lordships will humbly recommend to her Majesty that the decree appealed from be reversed, with costs.

Clarkson, Son & Cooper, proctors for the appellants.

Dalton, solicitor to the respondent.

(*a*) 1 H. & N. 503.



APPENDIX.

RULES FOR APPEALS

IN

ECCLESIASTICAL AND MARITIME CAUSES.

AT THE COURT AT WINDSOR,

The 11th day of December, 1865.

Present—THE QUEEN'S MOST EXCELLENT MAJESTY,
LORD PRESIDENT,
DUKE OF SOMERSET,
MR. SECRETARY CARDWELL.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 5th December instant, humbly setting forth, that by an Act passed in the session of Parliament held in the 6th and 7th years of her Majesty's reign, intituled "An Act to make further Regulations for facilitating the hearing Appeals and other matters by the Judicial Committee of the Privy Council," it was, amongst other things, enacted, that it should be lawful for the said Judicial Committee from time to time to make such rules, orders and regulations respecting the practice and mode of proceeding in all appeals from Ecclesiastical and Admiralty and Vice-Admiralty Courts, and the conduct and duties of the officers and practitioners therein, as to them should seem fit, and from time to time to repeal or alter such rules, orders and regulations; provided always, that no such rules, orders or regulations should be of any force or effect until the same should have been approved by her Majesty in Council: And that the Lords of the said Judicial Committee have agreed humbly to report to her Majesty their opinion that it is expedient that the following Rules should be established respecting the practice and mode of proceeding in all such appeals as aforesaid, and therewith humbly submitting the same for the approval of her Majesty in Council.

Her Majesty having taken the said report into consideration was pleased, by and with the advice of her Privy Council, to approve thereof, and of the Rules set forth therein, in the words following, videlicet:—

Rules for Appeals in Ecclesiastical and Maritime Causes.

1. In the construction of these Rules, the following terms shall (if

not inconsistent with the context or subject-matter) have the respective meanings hereinafter assigned to them; that is to say:—

- “Appeal” shall mean an appeal to her Majesty in Council in any ecclesiastical or maritime cause:
- “Judicial Committee” shall mean the Judicial Committee of her Majesty’s Privy Council, as the same shall be constituted for hearing any such appeal:
- “Registry” shall mean the registry of her Majesty’s Court of Appeals in ecclesiastical and maritime causes:
- “Registrar” shall mean the registrar of her Majesty in ecclesiastical and maritime causes:
- “Solicitor” shall mean any proctor, solicitor, or attorney entitled to practise before the Judicial Committee in any appeal, or the party himself when conducting the appeal in person:
- “Instrument” shall mean any inhibition, citation, monition, relaxation, remission, attachment, sequestration, or other document on parchment issued under the seal of her Majesty in ecclesiastical and maritime causes:
- “Month” shall mean calendar month.

2. Any solicitor, attorney, or proctor who shall be entitled to practise in the High Court of Chancery in England, in the Superior Courts of Common Law at Westminster, in the High Court of Admiralty of England, or in the Arches Court of Canterbury, shall be entitled to practise in any appeal.

3. A solicitor desiring to prosecute an appeal shall leave in the registry his petition to her Majesty in Council in duplicate, together with an office copy of the decree or order appealed from, if the appeal has been *apud acta*, or the instrument of appeal, if the appeal has been before a notary or witnesses. A form of the petition of appeal is given in the Appendix, and is marked No. 1.

4. When the registrar has ascertained that the petition of appeal has been referred to the Judicial Committee, he may, on the application of the solicitor, issue the usual inhibition and citation, and monition for process. Forms of the inhibition and citation, and of the monition for process are given in the Appendix, and are marked Nos. 2 and 3.

5. If, within *one month* from the date of the petition of appeal being referred to the Judicial Committee, the solicitor for the appellant shall not take out the inhibition and citation, and the monition for process, the appeal shall stand dismissed.

6. The inhibition and citation shall be served on the registrar of the Court appealed from, as well as on the adverse party. If proof is given to the satisfaction of the registrar that service cannot be made upon the adverse party, it may be served upon his solicitor. It may also in any case be served upon the solicitor instead of the party, if the solicitor is willing to accept such service. The monition shall be served on the registrar of the Court appealed from.

7. Within *one month* from the issue of the inhibition and citation,

and the monition for process, if the appeal is from a Court in the United Kingdom, and within *four months* if from a Court out of the United Kingdom, the solicitor for the appellant shall return the same duly served, together with the process, into the registry, and if he shall not do so, the appeal shall stand dismissed.

8. The solicitor for the respondent may enter an appearance at any time after the petition of appeal has been referred to the Judicial Committee, and whether the inhibition and citation and the monition for process have been taken out or not. A form of the appearance is given in the Appendix, and is marked No. 4.

9. If the respondent's solicitor desires to adhere to the appeal, he shall within *one month* from the time of entering an appearance file in the registry a declaration of adhesion, stating from what part of the decree or order of the Court below he desires to appeal. A form of the declaration of adhesion is given in the Appendix, and is marked No. 5.

10. Within *one month* from the process being brought in, the solicitor for the appellant shall bring into the registry printed copies of the Appendix; and if he shall not do so, the appeal shall stand dismissed.

11. The Appendix shall be paged consecutively throughout, and shall have an Index at the commencement. It shall contain a copy of all documents filed in the Court below material to the issue in the appeal, and of the *judgment* of the said Court given on the occasion of the decree or order appealed from, *certified by the reporter of the Court to be correct*.

12. Within *one month* from the printed copies of the Appendix being brought in, the solicitor for the appellant shall bring into the registry printed copies of his case; and if he shall not do so the appeal shall stand dismissed.

13. Within *one month* from the printed copies of the Appendix being brought in, the solicitor for the respondent shall bring in printed copies of his case; and if he shall not do so, the appellant may notwithstanding proceed with his appeal.

14. As soon as the time allowed for bringing in the cases has expired, the appeal shall stand for hearing before the Judicial Committee, provided that where an appearance has not been entered a period of *four months* has expired from the bringing in of the petition of appeal.

15. Where the appellant resides out of the United Kingdom, he shall, within *two months* after his solicitor has been served with a notice to that effect, give bail by two sufficient sureties to answer the costs of the appeal in the sum of *two hundred pounds*; and if he shall not do so, the appeal shall stand dismissed. Forms of the bail bond, affidavit of justification, and commission to take bail, are given in the Appendix, and are marked Nos. 6, 7 and 8.

16. At any time before the appeal is set down for hearing before the Judicial Committee, the registrar may, on the application of either solicitor, make an order on the adverse solicitor to file a proxy from his party within such time as the registrar shall appoint, and if the

adverse solicitor shall not within such time file his proxy, motion may be made to the Judicial Committee to enforce the order either by dismissing the appeal, or in such other way as the Judicial Committee shall direct. A form of the proxy is given in the Appendix, and is marked No. 9.

17. It shall be competent to the appellant's solicitor at any stage of the proceedings to file in the registry a proxy from his party, stating that he abandons the appeal, and consents to be condemned in the costs thereof, and thereupon the appeal shall stand dismissed. A form of the proxy of abandonment is given in the Appendix, and is marked No. 10.

18. The registrar may, on good cause shown, extend the time allowed by these Rules for doing any act.

19. When an appeal by these Rules stands dismissed, the appellant shall, unless there is a special agreement to the contrary, stand condemned in the costs of the appeal.

20. When an appeal by these Rules stands dismissed, either solicitor may within one fortnight from that time file in the registry a notice of motion to have the appeal reinstated, and on the hearing of the motion the Judicial Committee may, if it so think fit, direct the appeal to be reinstated, subject to such order as to the costs or otherwise as to it shall seem meet.

21. If notice of motion to have the appeal reinstated be not given within the time prescribed by the preceding Rule, the registrar may, on the application of either solicitor, issue a relaxation of the inhibition. A form of the relaxation of inhibition is given in the Appendix, and is marked No. 11.

22. If, on the final hearing, the Judicial Committee shall order the cause to be remitted, the registrar shall, on the application of either solicitor, issue a remission. A form of the remission is given in the Appendix, and is marked No. 12.

23. Neither solicitor shall be entitled to plead specially, whether in objection to the jurisdiction, or in respect of *noviter perventa* or of any other matter, without leave having been first obtained from the Judicial Committee.

24. In case either solicitor is allowed to plead, the Rules which are in force for the time being in the High Court of Admiralty in regard to pleadings and proofs shall, so far as they are applicable, and not inconsistent with these Rules, be the Rules in regard to pleadings and proofs in appeals.

25. In case any matter is referred to the registrar, or to the registrar assisted by merchants, to report upon, the same Rules which are in force for the time being in the High Court of Admiralty in regard to references shall, so far as they are applicable, be the Rules in regard to references in the Court of Appeal.

26. If a party shall not pay any amount which shall have been found to be due from him within *a fortnight* after he shall have received notice from the adverse solicitor demanding payment of the same, the registrar may, on the application of the solicitor, and on an affidavit being filed proving the notice, issue a monition for payment

thereof. A form of the monition for payment is given in the Appendix, and is marked No. 13.

27. Upon the monition being returned duly served, and an affidavit filed that the amount has not been paid, motion may be made to the Judicial Committee for an attachment or a sequestration, as the case may be. Forms of the attachment, supersedeas of attachment, sequestration, relaxation of sequestration, sequestration of benefice, and relaxation of sequestration of benefice are given in the Appendix, and are marked Nos. 14, 15, 16, 17, 18 and 19.

28. When an Appendix or case is brought in, *sixty* copies thereof shall be left in the registry, and *forty* delivered to the adverse solicitor, if any.

29. Save in an appeal proceeding by default, no document shall be allowed to be filed without a certificate that a copy thereof has been previously served upon the adverse solicitor.

30. Any consent in writing between the solicitors may, with the approval of the registrar, be filed, and shall thereupon become an order of Court.

31. The practice heretofore existing in regard to libels of appeal, setting down causes on motion by counsel, and all acts and proceedings before surrogates, are abolished. But the same fees shall be allowed for filing any document, returning any instrument, or doing any act by a solicitor in the registry, as have heretofore been allowed for doing any similar act before a surrogate in chambers.

32. The existing practice of the Court shall continue in force, save in so far as it is inconsistent with these Rules.

33. All instruments already issued or hereafter to be issued, and which are made returnable before the Judicial Committee, or before a surrogate of the Judicial Committee, may be returned into the registry.

34. These Rules shall come into operation on the first day of February, 1866, and shall apply to all appeals prosecuted on or after that day, and to all proceedings which shall then remain to be had or done in appeals prosecuted before that day.

AND HER MAJESTY is further pleased to order, and it is hereby ordered, that the foregoing Rules be punctually observed, obeyed, and carried into execution in all appeals or petitions and complaints in the nature of appeals, brought to her Majesty, or to her heirs and successors, from the High Court of Admiralty of England, or from any of Her Majesty's Courts of Vice-Admiralty in any of her Majesty's colonies or plantations abroad, or from any other Court of Admiralty jurisdiction, and likewise from all Courts ecclesiastical from which an appeal lies to her Majesty in Council:

Whereof the Right Honourable the Judge of the High Court of Admiralty in England, the Right Honourable the Dean of the Arches Court of Canterbury, the Commissary of the Exchequer Court of York, and all other judges and officers of the said Courts of Admiralty or Ecclesiastical jurisdiction, and all other persons whom

it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.

SCHEDULE annexed to the foregoing Order,

FORM No. 1.—*Petition of Appeal.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].

[*State Title of Appeal.*]

To the Queen's most Excellent Majesty :

The humble petition of [*state name and address of solicitor*],
solicitor for the above-named [*state appellant's name*],

Sheweth,

That in a certain cause lately depending in the [*state Court appealed from*], promoted by [*state name and description of plaintiff in Court below*] against [*state name and description of defendant and of property, if any, proceeded against in Court below*], the [*state name of judge*], the judge of the said Court, did on the day of
18 decree or order [*state purport of decree or order appealed from*],
from which decree or order an appeal has been duly interposed.

Wherefore your petitioner most humbly prays that your Majesty will be graciously pleased to reverse the said decree or order, or to make such order in the premises as to your Majesty shall seem meet.

Dated at this day of 18 .

[*To be signed by the solicitor.*]

FORM No. 2.—*Inhibition and Citation.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].

[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith : To all and singular our liege subjects, being literate persons whomsoever and wheresoever in and throughout our said United Kingdom and other our dominions, and especially to our officer lawfully appointed, greeting :

Whereas in a cause [*state nature of cause*], lately depending in [*state from what Court the cause is appealed*], promoted by [*state name and description of plaintiff in Court below*] against [*state name and description of defendant and of property, if any, proceeded against in Court below*], the [*state name of judge*], the judge of the

said Court, did on the day of 18 [*state purport of decree or order appealed from*], from which said decree or order an appeal has been duly made to us in Council on behalf of the said [*state name of appellant*], and has by us been referred to the Judicial Committee of our said Council.

We do therefore hereby authorize and command you jointly and severally to inhibit or cause to be inhibited the said [*state name and title of judge of Court below*], from whom the said cause is appealed, his registrar or actuary, and the said [*state name of respondent*] and all other persons whomsoever, that neither they nor any of them pending the said appeal do or attempt anything to the prejudice of the said appellant or of his said appeal. And further, that you cite or cause to be cited the said [*state name of respondent*] and all other persons having any interest in the said appeal, to enter an appearance in the registry of our Court of Appeals for Ecclesiastical and Maritime Causes, situate at within days after service hereof. And that you warn them that if they do not enter an appearance as aforesaid, we shall proceed to determine the said appeal, or make such order in the premises as to us shall seem meet.

Given at London, under the seal which we use in this behalf, the
day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Inhibition and citation.

Taken out by .

FORM No. 3.—*Monition for Process.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].

[*State Title of Cause.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To all and singular our liege subjects, being literate persons whomsoever and wheresoever in and throughout our said united kingdom and other our dominions, and especially to our officer lawfully appointed, greeting:

Whereas in a cause lately depending in the [*state Court appealed from*], promoted by [*state name and description of plaintiff in Court below*] against [*state name and description of defendant and of property, if any, proceeded against in Court below*], the [*state name of judge*], the judge of the said Court, did on the day of 18 [*state purport of decree or order appealed from*], from which decree or order an appeal has been duly made to us in Council on behalf of the said [*state name of appellant*], and has by us been referred to the Judicial Committee of our Privy Council: We do hereby authorize and command you jointly and severally to monish, or cause to be monished the said [*state name and title of judge of*

FORM No. 6.—*Bail Bond.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

WHEREAS in a cause lately depending in [*state Court appealed from*], promoted by [*state name and description of plaintiff in Court below*] against [*state name and description of defendant and property, if any, proceeded against in Court below*], an appeal has been made to her Majesty in Council on behalf of [*state name of appellant*], and has by her Majesty been referred to the Judicial Committee of her said Council. Now therefore we [*state names and descriptions of sureties*] hereby jointly and severally submit ourselves to the jurisdiction of the said Judicial Committee, and consent that if *he* the said [*state name of appellant*] shall not pay what may be adjudged against *him* for the costs of the said appeal, execution may issue forth against us, our heirs, executors, and administrators, goods and chattels, for a sum not exceeding [*state sum in words and figures*] pounds.

This bail bond was signed by the said	} <i>Signatures of Sureties.</i>
and the sureties,	
the day of 18	
Before me	

[*To be signed before the registrar or
one of the clerks in the registry, or
before a commissioner.*]

FORM No. 7.—*Affidavit of Justification.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

I [*state name, address, and description*], one of the proposed sureties for [*state name, address, and description of the person for whom bail is to be given*], make oath and say, that I am worth more than the sum of [] hundred pounds after payment of all my debts.

On the day of 18 ,	} <i>Signature of Surety.</i>
the said was duly sworn to	
the truth of this affidavit at	
Before me	
<i>Commissioner.</i>	

FORM No. 8.—*Commission to take Bail.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To [*state name and address of Commissioner*] greeting:

Whereas in the above-named appeal now depending before the Judicial Committee of our Privy Council bail is required to be taken on behalf of [*state name and description of appellant*], the appellant, in the sum of two hundred pounds, to answer judgment so far as regards the costs of the said appeal: We therefore hereby authorize you to take bail in the said sum on behalf of the said [*state name of appellant*] from two sufficient sureties, who may be produced before you for that purpose, upon the bail bond hereto annexed, and to swear the said sureties to the truth of the annexed affidavits as to their sufficiency: and we command you, upon the said bail bond and affidavits being duly executed and signed by the said sureties, to transmit the same, attested by you, into the registry of our Court of Appeals for Ecclesiastical and Maritime Causes.

Given at London, under the seal which we use in this behalf, the
day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Commission for bail.

Taken out by

The form of oath to be indorsed on the Commission, and to be administered to each of the sureties.

You swear that the contents of the affidavit to which you have signed your name are true.

So help you GOD.

FORM No. 9.—*Proxy.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

I [*state name, address and description*], lately the [*state whether plaintiff or defendant*] in a cause which was depending in the [*state in what Court*], and from the decree in which an appeal has been interposed to her Majesty in Council, and now the [*state whether appellant or respondent*] in the said appeal, do hereby appoint [*state name and address of solicitor*] to appear and conduct all proceedings in my behalf in this appeal.

Dated the day of 18 .

[*To be signed by the party.*]

Witness,

FORM No. 10.—*Proxy of Abandonment.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

I [*insert name and description*], the appellant in the above-named appeal, do hereby declare, that I abandon the same, and proceed no further therein, and I undertake to pay all costs that may have been incurred by the respondent herein; and I authorize and direct you [*insert name of solicitor*], my solicitor in the said appeal, to file this proxy in the registry of her Majesty's Court of Appeals for Ecclesiastical and Maritime Causes.

Dated the day of 18 .

[*To be signed by the appellant.*]

Witness,

FORM No. 11.—*Relaxation of Inhibition.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To [*state name and title of judge of Court below*], or his surrogate, or some other competent judge in this behalf, greeting:

Whereas in a cause lately depending in the said Court promoted by [*state name and description of plaintiff in Court below*], against [*state name and description of defendant and property, if any, proceeded against in Court below*], an appeal from an order or decree of the judge of the said Court was made to us in Council on behalf of the said [*state name of appellant*], and was by us referred to the Judicial Committee of our said Council: And whereas on the day of 18 , we did command that [*you*] the said [*state name and title of judge from whom the cause was appealed*], [*your*] registrar or actuary, and the said [*state name of respondent*], and all other persons whosoever, should be inhibited from attempting anything to the prejudice of the said appellant or of his said appeal: And whereas the said [*state name of appellant*] has abandoned his said appeal [*or failed to prosecute his said appeal within the time allowed by law*], we do therefore hereby relax the said inhibition, justice so requiring.

Given at London, under the seal which we use in this behalf, the

day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Relaxation of inhibition

Taken out by

is due] for [*state for what the sum is due*]: We therefore hereby command you the said [*state name of person monished*] to pay within days from the service hereof (exclusive of the day of service) the said sum of [*state sum in words*] to the said [*state name and address of person to whom the money is to be paid*] accordingly, and hereof fail not.

Given at London, under the seal which we use in this behalf, the

day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Monition to pay £

Taken out by

FORM No. 14.—*Attachment.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].

[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To all and singular our justices of the peace, mayors, sheriffs, bailiffs, marshals, constables, and to all our officers, ministers, and others whomsoever, greeting:

Whereas in the above-named appeal, now or lately depending before the Judicial Committee of our Privy Council, our said Judicial Committee has decreed [*state name and description of person to be attached*] to be attached for manifest contumacy and contempt in not having obeyed our monition bearing date the day of 18 , heretofore issued by us in the said appeal, requiring him to [*state in what the contempt has consisted*], we therefore hereby command you to attach and arrest the said [*state name of person to be attached*], and to keep him under safe arrest until you shall receive further orders from us, or until the said [*state name of person to be attached*] shall have obeyed our said monition, and cleared himself of his said contempt.

Given at London, under the seal which we use in this behalf, the

day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Attachment

Taken out by

Indorsement.

In Her Majesty's } To receive into your custody the body of
Court of Appeals. } herewith sent you, for the cause here-
under written; that is to say,

For his manifest contumacy and contempt in not having obeyed the within-mentioned monition (*or as the case may be*).

A. B.

H. M. Registrar.

FORM No. 15.—*Supersedeas of Attachment.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the
 or keeper of our prison called the in our county of
 his deputy or deputies, and all persons whomsoever in whose custody the body of the under-mentioned [*state name of person attached*] now is or remains, greeting:

Whereas the Judicial Committee of our Privy Council has ordered that the attachment heretofore issued in the above-named appeal against the said [*state name and description of person attached*], bearing date the day of 18 , be superseded [*here state the conditions, if any, on which the supersedeas is to issue*]: We therefore hereby command that [*here state the conditions as before*] you forthwith release the said [*state name of person attached*], and hereof fail not.

Given at London, under the seal which we use in this behalf, the
 day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Supersedeas of attachment
 Taken out by

FORM No. 16.—*Sequestration.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To [*state names, addresses, and descriptions of the sequestrators*], greeting:

Whereas in the above-named appeal, now or lately depending before the Judicial Committee of our Privy Council, our said Judicial Committee has decreed process of sequestration against the real and personal estate and effects of [*state name, address and description of person whose property is to be sequestered*], for manifest contumacy and contempt in not having obeyed our monition bearing date the day of 18 , heretofore issued by us in the said appeal, requiring him to [*state in what the contempt has consisted*]. We therefore, confiding in your prudence and fidelity, hereby command you [*or two of you*] that you do at certain proper and convenient days and hours enter upon all the messuages, lands, tenements, and real estate whatsoever and wheresoever situate within our domi-

nions of the said [*state name of person whose property is to be sequestered*], and that you collect and receive into your hands the rents and profits of his said real estate and all his personal estate wheresoever lying within our dominions, and keep the same in your hands until you shall have levied [*here state the sum, if any, to be levied, and any necessary directions as to the disposal thereof*], or until the said [*state name of person whose property is to be sequestered*], shall have cleared his contempt [*or as the case may be*], and our said Judicial Committee shall make other order to the contrary; and that you from time to time report to us what you shall do in the premises.

Given at London, under the seal which we use in this behalf, this
day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Sequestration

Taken out by

FORM No. 17.—*Relaxation of Sequestration.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].

[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To [*state names and addresses of sequestrators*], greeting:

Whereas the Judicial Committee of our Privy Council has ordered that the sequestration heretofore issued in the above-named appeal against [*state name of person whose property was sequestered*], bearing date the day of 18 , be relaxed, we therefore hereby command that you release all the messuages, lands, tenements, and real estate whatsoever and wheresoever situate within our dominions of the said [*state name of person whose property was sequestered*], and desist henceforth from collecting or receiving the rents and profits of his said real estate; and further, that you release all his personal estate wheresoever lying within our dominions which may not have been already disposed of by you in accordance with the tenor of our said sequestration; and that you duly report to us what you shall have done in the premises.

Given at London, under the seal which we use in this behalf, this
day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Relaxation of sequestration

Taken out by

FORM No. 18.—*Sequestration of Benefice.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God by Divine permission Lord Bishop of , greeting:

Whereas in the above-named appeal, now or lately depending before the Judicial Committee of our Privy Council, our said Judicial Committee has decreed process of sequestration against [*state name of the person whose benefice is to be sequestered*], rector of the rectory [*or vicar of the vicarage*] and parish church of in the county of and within your diocese: We therefore hereby command that you enter into the said rectory [*or vicarage*] and parish church of and take and sequester the same into your possession, together with the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and all other ecclesiastical goods in your diocese of and belonging to the said rectory [*or vicarage*] and parish church, and to the said as rector [*or vicar*] thereof; and that you hold the same in your possession until [*state here the purpose for which the sequestration is made, and any other necessary directions, according to the circumstances*], and until our said Judicial Committee shall make other order to the contrary; and that you from time to time report to us what you shall do in the premises.

Given at London, under the seal which we use in this behalf, this day of in the year of our Lord 18 .

(L.S.)

A.B.

H. M. Registrar.

Sequestration of Benefice

Taken out by

FORM No. 19.—*Relaxation of Sequestration of Benefice.*

In Her Majesty's Court of Appeals.

From the [*state Court appealed from*].[*State Title of Appeal.*]

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith: To the Right Reverend Father in God by Divine permission Lord Bishop of , greeting:

Whereas the Judicial Committee of our Privy Council has ordered that the sequestration heretofore issued in the above-named appeal

against [*state name of person whose benefice was sequestered*], rector of the rectory [*or vicar of the vicarage*] and parish church of in the county of and within our diocese, bearing date the day of 18 , be relaxed. We therefore hereby command that you release the said rectory [*or vicarage*] and parish church, together with the rents, tithes, rent-charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and all other ecclesiastical goods in your diocese of and belonging to the said rectory [*or vicarage*] and parish church, and to the said as rector [*or vicar*] thereof, except such as may have been already disposed of by you in accordance with the tenor of our said sequestration; and that you duly report to us what you shall do in the premises.

Given at London, under the seal which we use in this behalf, this day of in the year of our Lord 18 .

(L.S.)

A. B.

H. M. Registrar.

Relaxation of Sequestration of Benefice
Taken out by

ORDERS IN COUNCIL AS TO SAILING RULES, &c.

The APPENDIX to LUSHINGTON'S REPORTS contained an Abstract of various ORDERS IN COUNCIL, which had been issued in pursuance of the 58th section of the Merchant Shipping Act Amendment Act, 1862, directing that the Regulations for preventing collision, which were appended to the Order in Council, dated 9th January, 1863, should apply to the ships belonging to various foreign countries therein specified, "whether within British jurisdiction or not." Since the publication of that volume, Orders in Council in similar form have directed that the same regulations shall "apply to" other foreign "ships, whether within British jurisdiction or not." Of these the following Abstract will be sufficient.

<i>Date of Order of Council.</i>			<i>Ships belonging to</i>
17 November, 1863	..	..	{ Turkey. Roman States. Chili.
8 February, 1864	..	..	{ Denmark Proper. Duchy of Schleswig.
27 August, 1864	..	..	United States of America.
29 June, 1865	..	..	Hawaiian Islands.
3 February, 1866	..	..	The Kingdom of Greece.

The same regulations have also been extended to ships "navigating the inland waters of North America." The Order in Council dated 30th November, 1864, after reciting the Merchant Shipping Act Amendment Act, 1862, and the Orders in Council, 9th January, 1863, and 27th August, 1864, proceeds as follows:—"And whereas the said Government of the United States of America have expressed a desire that the said regulations should be made to apply to ships navigating the inland waters of North America, and that they should apply to ships of the United States navigating such waters when beyond the limits of British jurisdiction:

"And whereas by an Act passed by the Legislative Council and Assembly of Canada, assented to on the 30th of June, 1864, and entitled 'An Act to amend the Law respecting the Navigation of Canadian Waters,' after reciting that it would tend to the greater security of life and property in vessels navigating Canadian waters, that the same rules of navigation and the same precautions for avoiding collisions and other accidents as were then adopted in the United Kingdom, and in other countries should also be adopted in Canada, it was enacted that on and after the first day of September, 1864, the rules contained therein with respect to lights, fog signals, steaming and sailing, should apply to all the rivers, lakes, and other

navigable waters whatsoever within the province of Canada, or within the jurisdiction of the Legislature thereof:

“And whereas the said rules so referred to are the same as the regulations appended to the said Order in Council, bearing date the 9th of January, 1863, except that they are not entitled regulations for preventing collisions at sea; and whereas the same are also appended to this Order:

“Now, therefore, her Majesty, by virtue of the power vested in her by the said Merchant Shipping Act Amendment Act, 1862, and by and with the advice of her Privy Council, is pleased to direct that the said regulations appended to this Order shall apply to ships belonging to the United States of America when navigating the inland waters of North America, whether within British jurisdiction or not.”

ORDER IN COUNCIL

*Dated 27th June, 1866, respecting the carrying of Lights, &c.
in the River Mersey.*

“WHEREAS by the 31st section of ‘The Merchant Shipping Act Amendment Act, 1862,’ it is enacted, that ‘any rules concerning the lights or signals to be carried by vessels navigating the waters of any harbour, river, or other inland navigation, or concerning the steps for avoiding collision to be taken by such vessels, which have been or are hereafter made by or under the authority of any local Act, shall continue and be of full force and effect, notwithstanding anything in this Act or in the schedule thereto contained :’

“And whereas by the 32nd section of the said recited Act, it is further enacted, that ‘in the case of any harbour, river, or other inland navigation, for which such rules are not and cannot be made by or under the authority of any local Act, it shall be lawful for her Majesty in Council, upon application from the harbour trust, or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or if there is no such harbour trust, or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning the lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessels navigating such waters; and such rules, when so made, shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in Table (C.) in the schedule to this Act, notwithstanding anything in this Act or in the schedule thereto contained :’

“And whereas the Mersey Docks and Harbour Board, being the Harbour Trust owning and exercising jurisdiction upon the waters of the River Mersey and in the sea channels and approaches thereto, have, under the circumstances provided for by the last-recited section of the said Act, applied to her Majesty in Council to make certain rules, which they have submitted for approval concerning the lights and signals, and concerning the steps for avoiding collision, to be taken by vessels navigating such waters :

“And whereas the rules so submitted as aforesaid appear to be reasonable and proper :

“Now, therefore, her Majesty, by virtue of the powers in her vested by the 32nd section of the said recited Act, and by and with the approval of her Privy Council, doth hereby make the said rules which are set forth in the schedule hereto.”

SCHEDULE.

Rules concerning the Lights or Signals to be carried, and concerning the steps for avoiding collision to be taken by Vessels navigating the River Mersey.

“1. All vessels, as well sailing vessels as steamers, including river craft exceeding 10 tons measurement, while navigating or anchoring in any part of the River Mersey below Warrington Bridge, shall, save as mentioned in the third rule, observe and obey the ‘Regulations for Preventing Collisions at Sea’ set out in Table (C.) in the Schedule to the Act 25 & 26 Vict. c. 63, the short title of which is ‘The Merchant Shipping Act Amendment Act, 1862,’ together with the additional regulations following:—

“2. Canal flats, or vessels without masts, being towed, shall carry the lights prescribed for sailing vessels by Articles 5 and 6 of the said Table (C.).

“3. The single bright light, prescribed by Article 7 of the same table, is to be carried by all vessels when at anchor in the Mersey or the sea channels or approaches thereto, at a height not exceeding twenty feet above the hull, suspended from the forestay, or otherwise near the bow of the vessel where it can be best seen; and in addition to the said light all ships or vessels having two or more masts shall exhibit another bright light, at double the height of the bow lights, at the main, or mizen peak, or the boom topping lift, or other position near the stern where it can be best seen.

“MEMORANDUM.—The above are all the new rules which the Mersey Docks and Harbour Board think needful to suggest, with a view to extending to the River Mersey the useful regulations prescribed by the said Act, but they propose to add the following by way of notice only:—

“NOTICE.—By the 29th section of the Act aforesaid, it is provided that, in case of a collision, if it be shown that either vessel has infringed any of the regulations for preventing collisions for the time being in force, such vessel shall be deemed in fault.”

THE FOLLOWING
LIST OF ORDERS IN COUNCIL

RESPECTING PILOTAGE MAY ALSO PROVE SERVICEABLE : —

<i>Date of Order.</i>			<i>Subject.</i>
7 January, 1864	..	..	Regulation of Pilots, Swansea.
1 March, 1864 ..	..	..	Pilotage Rates, Cardiff.
1 March, 1864 ..	..	..	Regulation of Pilots, King's Lynn.
28 July, 1864 ..	..	..	Pilotage Rates, Newport.
9 March, 1865 ..	..	..	Regulation of Pilots, Newport.
12 March, 1866	..	..	Regulation of Pilots, Hartlepool.
9 May, 1866 ..	..	..	Regulation of Pilots, Liverpool.
28 December, 1866	..	..	Regulation of Pilots, Cardiff.
17 May, 1867	Trinity House Pilots, Bridgewater.
3 August, 1867	Regulation of Pilots, Sunderland.

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ADMIRALTY COURT JURISDICTION. *See* BILLS OF LADING—COLLISION, I.—SALVAGE, I., III., IV.

AFFREIGHTMENT.

1. If, in the course of a voyage, a ship carrying cargo is damaged by the perils of the seas, the shipowner intending to carry the cargo to destination is entitled to a reasonable time for repairing his ship or for trans-shipping, and for this purpose to retain the cargo. *Cargo ex Galam* (P. C.) 167
2. If the master is prevented from carrying the cargo to destination by the act or default of the owner of the cargo, he has a possessory lien on the cargo for the entire freight, and for contribution to any general average expenses incurred.
Cargo ex Galam (P. C.) 167
3. If a vessel during her voyage suffers sea damage and is compelled to put into a port of refuge, then by the law of England the master is not in any case bound to trans-ship. He is allowed a reasonable time either to repair and carry on or to trans-ship. If he absolutely declines to do either, he may be called upon to deliver without payment of any freight; but, before a reasonable time has elapsed, he cannot be required to deliver, except on payment of full freight or waiver thereof *Bahia* 292
4. In estimating what is reasonable time, the Court will take all circumstances into consideration including any delay caused by the *vis major* of competent authority, whether administrative or judicial *Bahia* 292
5. The owner of cargo is not entitled to deduct from freight the proceeds of part cargo sold by the master.
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Norway .. 377

AMOUNT OF ACTION.

The Court of Admiralty may, before the hearing, allow the amount in which the cause has been instituted, to be increased *Mæander* (P. C.) 29

APPEAL.

1. In reviewing a judgment of the Court of Admiralty upon questions of nautical fact, the Judicial Committee will decline to alter the sentence, unless they are impressed with a reasonable conviction that it is wrong. Regarding the case as one of much doubt, but not being satisfied that the decision of the Court below was erroneous, the Judicial Committee affirmed the judgment, but without costs.

Constitution (P. C.) 324

2. The Court of Appeal, though reluctant to disturb the judgment of the Admiralty Court on a question of seamanship, will not shrink from doing so if satisfied by the advice of their nautical assessors that the decision of the Court below was erroneous *Falkland* (P. C.) 204
3. An appeal having been adhered to, and the sentence of the Court below being affirmed in all respects, each party was condemned in costs *Mæander* (P. C.) 29
4. The form of bail bond appointed to be given in the Admiralty Court by the Rules of 1859, to answer judgment "with costs," does not receive a new interpretation from the 33rd section of the 24 Vict. c. 10, and does not extend to cover the costs of an appeal. On an appeal from the Admiralty Court to the Privy Council, the appellant (at least if resident out of the jurisdiction) will be required by the Privy Council to give security for the costs of the appeal. An appellant will not be required to enlarge any security which he has given as defendant in the Court of Admiralty to answer judgment and costs in that Court, notwithstanding such security has proved insufficient for that purpose *Helene* (P. C.) 425

BAIL.

1. Sureties to a bail bond must not be partners . . . *Corner* 161
2. A vessel being under arrest, a bail bond signed by two sureties was taken before a commissioner in the country; and twenty-four hours' notice of the bail tendered having been given to the plaintiff's agent in London, the vessel was released. Within that twenty-four hours the plaintiff's solicitor in the country had given to the defendant's solicitor there formal notice of objection to the bail, on account of the sureties being partners, but had not telegraphed to his agent in London. Upon application by the plaintiff a second warrant was granted *Corner* 161
3. A plaintiff filing a caveat release upon a bail bond duly executed, and failing to show sufficient reason for entering the caveat, condemned in costs and damages . . . *Corner* 161
4. The form of bail bond appointed to be given in the Admiralty Court by the Rules of 1859, to answer judgment

BAIL—continued.

“with costs,” does not receive a new interpretation from the 33rd section of the stat. 24 Vict. c. 10, and does not extend to cover the costs of an appeal. On an appeal from the Admiralty Court to the Privy Council, the appellant (at least if resident out of the jurisdiction) will be required by the Privy Council to give security for the costs of the appeal. An appellant will not be required to enlarge any security which he gave as defendant in the Court of Admiralty to answer judgment and costs in that Court, notwithstanding such security has proved insufficient for that purpose *Helene* (P. C.) 425

BILLS OF LADING.**I. Construction of 24 Vict. c. 10, s. 6.**

1. The 6th section of 24 Vict. c. 10, gives a remedy in the Admiralty Court for all cases within the words of the section, whether or not in analogous cases there is a right of action at common law *Norway* 226
2. The bare assignee of a bill of lading to whom the property in the goods has not passed is not entitled to sue in the Admiralty Court under 24 Vict. c. 10, s. 6, for a breach of the contract contained in the bill of lading .. *St. Cloud* 4
3. The words in this section “goods carried into any port in England” do not mean “goods *imported* into England” exclusively. Where, therefore, the master of a foreign ship having a cargo consigned from New York to Dunkirk in France, put into Ramsgate and landed the cargo, and refused either to carry it on to Dunkirk or to give delivery to the owners at Ramsgate:—*Held*, that for such breach of duty by the master the ship could be sued in the Admiralty Court *Bahia* 61
4. The Court of Admiralty has jurisdiction under this section over a claim for short delivery of cargo as per bill of lading in a British port, though the goods not delivered were not in fact carried into port *Danzig* 102
5. A foreign vessel was chartered to carry coals on charterers’ account to a foreign port, and bring home to England a return cargo of timber. The charterers sued the ship under the 6th section of 24 Vict. c. 10, claiming damages, 1st, for non-delivery of certain coals on the outward voyage; 2ndly, for the improper delivery of the timber on the return voyage.—*Held*, that they were not entitled to sue in respect of the non-delivery of the coals abroad, as the statute did not give the Court such jurisdiction *Kasan* 1

II. Contract.

1. If a bill of lading is given by the master of a foreign vessel, the agreements to be implied as to the duty of the master to

BILLS OF LADING—*continued.*

carry on, trans-ship or deliver the goods at an intermediate port of refuge will be ascertained by reference to the law of the flag which the vessel carried, and not by reference to the *lex loci contractus* or the *lex fori*, or the law of the place where the breach of contract by the master is alleged to have been committed. *Bahia* 292

2. A bill of lading in English was given by the master of the French vessel *Bahia* lying in New York, by which the goods were made deliverable at Dunkirk in France. The vessel during her voyage suffered sea damage, and put into the port of Ramsgate in England (7th January, 1863). The cargo was there unladen, and the ship surveyed. The surveyor reported that the cost of repairs would exceed the value of the ship repaired. The master executed a deed of abandonment of the ship to the underwriters in France, with whom she was insured. Before the French vice-consul granted (as in ordinary course) the certificate of innavigability required by French law as sanctioning the abandonment, the French underwriters instituted proceedings in the tribunal of commerce of Marseilles, and obtained an order for the ship to be taken to Dunkirk to be repaired, and the vice-consul was then ordered by the consul-general to withhold the certificate of innavigability. The owner of the ship appealed from the decree of the tribunal of commerce to a higher court. The owners of the cargo offered the master full freight, less expenses of carrying on the cargo to Dunkirk, and demanded delivery at Ramsgate. This was refused, and they then (13th March, 1863) arrested the ship under 24 Vict. c. 10, s. 6. Subsequently the cargo was obtained from the master's possession without his consent, and carried to Dunkirk. Proceedings were then taken in France by the owner of the *Bahia* against the cargo to recover the original freight, and the Court there pronounced that the owners of the cargo "having withdrawn their goods in consequence of being unwilling to wait the solution of the question whether the vessel could or could not be put into a proper condition, owed the whole freight."—*Held*, that in these circumstances the reasonable time allowed to the master to trans-ship or repair had not elapsed at the time of action brought; and that he had committed no breach of contract *Bahia* 292
3. It is a breach of duty for the master of a ship who claims a lien on goods for freight and general average to withhold from the holder of the bill of lading such particulars within his knowledge as are necessary, in order to compute the amount of freight and general average contribution . . . *Norway* 226
4. A shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract

BILLS OF LADING—*continued.*

contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if it is not proved that at the time of shipment the shipper had notice of the charter *St. Cloud* 4

In the same circumstances (the owner of the ship not being domiciled in England or Wales) the ship is liable under 24 Vict. c. 10, ss. 6, 35 *St. Cloud* 4

5. The rights and the liabilities which the assignee of a bill of lading under the 1st sect. of 18 & 19 Vict. c. 111, has transferred to him, are the same rights and liabilities in respect of such goods as if the contract contained in the bill of lading had been made with him. In these are not included the rights and liabilities as between the shipper and the master dehors of that contract in respect of other goods or of the charter-party.. .. . *Helene* 415
6. In a bill of lading, where freight is made "payable as per charter-party," this reference incorporates into the bill of lading all the clauses in the charter-party which relate to the amount of freight, but only for the purpose of computing the amount of freight, not for the purpose of transferring to the holder of the bill of lading the benefit of covenants found in the same clauses of the charter-party, but not affecting the amount of freight .. *Norway* 226
7. Where a charter-party stipulated for lump freight, "the master guaranteeing the ship to carry 3,000 tons on a draught of 26 feet water, or to forfeit freight in proportion to the deficiency," and the ship could not, and in fact did not, carry a cargo of 3,000 tons.—*Held*, that an assignee of a bill of lading for such cargo, making freight "payable as per charter-party," had no cause of action against the ship under the 6th sect. of 24 Vict. c. 10, in respect of the master fraudulently guaranteeing, &c. *Norway* 226
8. Where a bill of lading for oil contains the ordinary exception of sea perils, and in the margin the memorandum, "Not accountable for leakage," upon loss by extraordinary leakage being proved, the burden of proof is on the shipowner to show that he is not liable for such loss. Such extraordinary leakage having been proved to have taken place from a mode of stowage which was hazardous, and from no special precautions being used to obviate the hazard.—*Held*, that the shipowners were liable .. *Helene* 415
9. A charter-party provided that the cargo should be taken alongside by the charterer, and be received and stowed by the master as presented for shipment, the charterer being allowed to appoint a head stevedore at the expense and responsibility of the master for proper stowage. The cargo was received

BILLS OF LADING—*continued.*

and stowed accordingly, the whole being shipped by the charterer (who was on board during the loading, and made no objection to the mode of stowing). Amongst other goods, oil was shipped in casks, and rags and wool were stowed in the same hold over and near it, without any bulk-head being placed between. Bills of lading for the oil making no reference to the charter, and containing the memorandum, "Not accountable for leakage," were assigned to merchants, purchasers of the oil, who had no notice of the charter. On the voyage extraordinary leakage in the oil took place from the wool and rags heating the oil casks, and causing them to shrink. The assignees sued on the bill of lading for the loss of the oil. Conflicting evidence was given as to whether the juxtaposition of wool and rags to oil in the same hold was known to be a dangerous mode of stowage.—*Held*, upon the evidence, that the mode of stowage was hazardous: and that the master taking the rags, wool and oil together, was bound to take extraordinary precautions to prevent mischief: that the shippers might have sued the shipowner for the loss of the oil: that if the shippers, notwithstanding the charter and the shipment thereunder, could not maintain such an action because of the charter and the shipment thereunder, the assignees might nevertheless recover the loss as for a breach of the contract therein contained in the bill of lading *Helene* 415

10. Where, by the memorandum in the margin of a bill of lading, the shipowner is "not accountable for leakage," the word leakage is not to be limited to "ordinary leakage" only, but the memorandum protects the shipowner as to all leakage except that caused by negligence. In an action upon such a bill of lading to recover damages for loss by leakage of any kind, the burden of proof is on the plaintiff to show that the leakage was caused by negligence.

Helene (P. C.) 420

11. A charter-party provided that the cargo should be taken alongside by the charterer, and be received and stowed by the master as presented for shipment, the charterer being allowed to appoint a head stevedore at the expense and responsibility of the master for stowage. The cargo was received and stowed accordingly, the whole being shipped by the charterer, who also was on board during the loading, and saw the mode of stowage, and made no complaint. Amongst other things oil was shipped in casks, and rags and wool were stowed in the same hold over and near it, without any bulk-head between. Bills of lading for the oil, making no reference to the charter, but containing a memorandum in the margin "Not accountable for leakage,"

BILLS OF LADING—*continued.*

were assigned to merchants, the purchasers of the oil, who had no notice of the charter. On the voyage extraordinary leakage from the oil casks took place, by the wool and rags heating the casks and causing them to shrink. The assignees sued upon the bill of lading to recover damages for the loss of the oil. Conflicting evidence was given whether the juxtaposition of rags and wool to oil in the same hold was known to be a dangerous mode of stowage.—*Held*, upon the evidence, that the master did not know, and was not bound to know, the heating tendency of wool and rags on oil casks if placed in contiguity; and that, if he did know it, he was not in the circumstances bound to go to the expense of putting up bulk-heads between the wool and rags and the oil, to separate them; and that the leakage, therefore, was not caused by negligence.

Helene (P. C.) 429

12. *Quære*, whether in an action by the assignees of the bills of lading under 18 & 19 Vict. c. 111, for damage to the goods by bad stowage, the assent of the shipper to such stowage affords any defence *Helene* (P. C.) 429

13. A cargo of rice for a foreign ship was bought at Rangoon by the firm of Ashburner & Co., on joint account for themselves and one De Mattos, a merchant in England. The bills of lading were indorsed by the firm to Mr. Ashburner, the plaintiff, member and representative of their firm in this country, for the purpose of realizing the cargo on arrival. De Mattos being indebted in other transactions to the firm of Ashburner & Co. in a large sum, exceeding half the value of the cargo, directed Mr. Ashburner to apply any profit that might be due to him (De Mattos) upon the sale of the cargo to reduction of his general account with the firm.—*Held*, that the property of the cargo was in the plaintiff, and that he, alleging breaches of contract and breaches of duty on the part of the master of the ship in respect of the cargo, was entitled to sue the ship upon the bill of lading under the 6th section of the statute 24 Vict. c. 10 . . . *Norway* 377

14. The bills of lading for the rice made “freight payable as per charter-party.” This charter-party was between De Mattos and the master of the ship. The master undertook “to take out a cargo of salt from Liverpool to Calcutta, and there, after discharge, reload, or at freighter’s option proceed to Rangoon, Akyab or Bassein, and there load a full cargo of lawful merchandise, and therewith proceed to Falmouth for orders to proceed to London or Liverpool or (other specified ports), or so near thereunto as she might safely get, and deliver the same.” In consideration whereof the merchant agreed to pay “as freight for the use and hire of the

BILLS OF LADING—continued.

said vessel 11,250*l.* lump sum, the master guaranteeing to carry 3,000 tons dead weight of cargo upon a draught of twenty-six feet water, or to forfeit freight in proportion of deficiency." The stipulation for the mode of payment of the freight provided for instalments and advances during the voyage, concluding, "the balance as follows: viz. one third in cash on arrival at port of delivery, and the remainder on true and final delivery of the cargo at the said port of discharge by good and approved bills payable in London, or cash equal to three months' date from the delivery." . . . Other stipulations followed; amongst them: "The vessel to be addressed at all ports to freighter's agent, paying one commission only on this charter, not exceeding 5 per cent." "For the payment of all freight, dead freight, demurrage or other charges, the master or owners shall have an absolute lien on the said cargo laden on board." The homeward cargo was shipped at Rangoon. In going down the Rangoon river, the ship took the ground; in consequence of which she afterwards leaked, and the master was thereby obliged to jettison part of the cargo, and put into a port of refuge and sell another part of the cargo sea-damaged. The master then sailed with the residue of the cargo on board, and arriving at Falmouth was ordered to proceed to Liverpool. At Liverpool a dispute arose as to the amount due on the cargo for freight and general average, and the master peremptorily refused delivery except on receipt of a certain sum, which the plaintiff declined to pay. The master also refused to go into one of the closed docks as requested by the plaintiff, and went into another dock, whereby certain additional expenses would necessarily be incurred by the owner of the cargo. The plaintiff then instituted this cause under the 6th section of the Admiralty Court Act, claiming damages for non-delivery and other breaches of contract:—*Held*, that the master's guarantee was not a guarantee that the ship should actually carry 3,000 tons on the homeward voyage, either from the port of shipment or to the port of discharge, but a guarantee of the capacity of the ship that she could carry 3,000 tons, and that she could do so upon a draught of twenty-six feet water, and that as loading was contemplated in rice ports which are situate in rivers, the word "water" meant water at the place of loading, whether fresh or salt. This guarantee being broken,—*Held*, that "the forfeiture of freight in proportion to deficiency" was a forfeiture of such a proportion of the lump freight as corresponded to the deficiency from 3,000 tons of such carrying capacity of the ship, and that in assessing the amount to which the master's lien for freight extended against the plaintiff as the holder of the bills of lading for the entire

BILLS OF LADING—*continued.*

cargo making freight payable as per charter-party, the plaintiff was entitled to the benefit of the forfeiture of part freight under the guarantee. The Court also directed the registrar and merchants to report whether the plaintiff was entitled to deduct from the freight the address commission. The Court having found upon the evidence that the grounding of the ship had been occasioned by the negligent navigation of a pilot who was not employed by compulsion of law, and that the loss to the owner of the cargo by the consequent jettison and sale was in law occasioned by the negligence of the shipowner,—*Held*, that the ship was liable under the statute in damages for the nett value of the rice so lost, viz., the value of the rice in a sound state at the time and place of delivery, less the proportion of freight and necessary charges on account thereof.—*Held*, also, that in assessing the amount of the master's lien for freight, the plaintiff could not deduct the value of the part cargo so lost by the shipowner's negligence, but was entitled to deduct a proportionate part of the lump freight.—*Held*, also, that the plaintiff was entitled to damages for non-delivery of the residue of the cargo, notwithstanding that he had made no sufficient tender of the freight and general average due thereon, for that the master had in law waived any such tender; 1st. By demanding an excessive sum in such a manner as to dispense with any offer of a smaller sum; 2ndly. By withholding from the plaintiff the papers in his possession necessary to calculate the amount really due, such papers being (1.) A pro formâ freight account showing all the deductions from the lump freight, and the sum total claimed. (2.) A memorandum from an average adjuster as to the probable amount of contribution from the cargo for general average. (3.) The particulars of the tonnage shipped at the rice port; the particulars of the jettison; and the surveys and account sales at the port of refuge.—*Held*, also, that the withholding such papers was a breach of duty by the master, giving a right of action under the Admiralty Court Act.—*Held*, also, that the master was not bound to discharge in any particular dock named by the holder of the bills of lading, but was justified in discharging the rice on any wharf in the port of discharge on which goods of a like nature are usually placed.—25 & 26 Vict. c. 63, s. 67. After the filing of the plaintiff's petition, the master, who had previously entered the cargo inwards, the plaintiff in the circumstances declining to do so, employed a master porter to land the rice. In landing the rice the master porter did not "assort" it as is usual with rice cargoes in anywise damaged, and thereby the rice became depreciated in value. At the hearing the plaintiff gave evidence of this non-assort-

BILLS OF LADING—*continued.*

ment and consequent depreciation of the rice. The Court, having found that the master had wrongfully refused delivery to the plaintiff,—*Held*, that the master, having taken upon himself to land the cargo was bound to have “assorted” it in the usual manner, and that the ship was liable for the damages caused by the non-assortment. After the landing of the cargo and during the progress of the cause the plaintiff obtained delivery upon paying into Court a certain sum of money. The Court in its decree directed the registrar and merchants to take an account of the freight due in respect of the cargo according to the positions laid down in the judgment, of the damages pronounced for, and of the amount, if any, due for general average contribution from the cargo ; and to report the balance . . . *Norway* 377

15. In an action upon the bill of lading against the shipowner for loss of part cargo alleged to have been jettisoned and sold in consequence of the ship stranding, the plaintiff is not entitled to recover, unless he proves affirmatively that the stranding was occasioned by the negligent navigation of the ship.—*Held*, upon the evidence reversing the judgment of the Admiralty Court, that this burden of proof was not satisfied, and that the loss was by perils of the seas.

The loss of part cargo having been occasioned by perils of the seas,—*Held*, that under the bills of lading and charter-party, the master’s lien on the residue for freight extended to the entire lump freight without deduction. *Quære*, whether, assuming the loss to have been by the shipowner’s negligence, the Court of Admiralty was right in allowing a deduction from the lump freight of a proportionate sum representing the freight of the part not delivered.

Construction put by the Court of Admiralty upon the master’s guarantee “to carry 3,000 tons, &c.” affirmed.

A reference was ordered to the registrar and merchants to take an account between the parties, and to report (*inter alia*) whether the plaintiff as holder of the bills of lading was entitled to deduct from the lump freight the address commission mentioned in the charter, and whether such right was forfeited by the plaintiff’s agent having refused to take charge of the ship at the port of discharge.—

Held, reversing the judgment of the Court of Admiralty, that, although the master wrongfully withheld the cargo, his duty did not go beyond its safe custody and protection, and that he was not bound to assort the rice on landing it.

Norway (P. C.) 404

III. *Measure of Damages.*

1. In cases brought in the Admiralty Court under 24 Vict. c. 10, s. 6, the damages will be referred to the Registrar and Mer-

BILLS OF LADING—*continued.*

chants, with instructions to follow the rules of the Courts of Common Law as to the measure of damages. . . *St. Cloud* 4

2. In case of injury to goods by improper stowage, loss upon a contract of resale which was entered into before delivery, and of which the defendant had no notice at the time of making the original contract, is not to be allowed.

St. Cloud 4

IV. *Stoppage in Transitu.*

1. If the vendee of goods having received from the vendor an indorsed bill of lading making the goods deliverable to order or assigns, indorses and delivers it to a banker as a security for past and future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods in transitu.

Marie Joseph (P. C.) 449

2. The vendee of goods having received from the vendor an indorsed bill of lading making the goods deliverable to order or assigns, and having given an acceptance for the price, returned the bill of lading to the vendor, to hold "as security against the acceptance until the goods are sold or the vessel arrives," and afterwards by fraudulent representation again obtained possession of the bill of lading from the vendor, and negotiated it by indorsement and delivery to a third person, who took without notice of the fraud.—*Held*, reversing the judgment of the Admiralty Court, that the vendee's fraud did not vitiate his power to pass a good title by indorsement, and that the right of such third person under the indorsement should prevail against the claim of the unpaid vendor to stop the goods in transitu *Marie Joseph* (P. C.) 449

3. A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands, for the purpose of stoppage in transitu, in the position of vendor; and the indorsement by him of one bill of lading to the vendee does not, of itself, defeat his right to stop in transitu *Tigress* 38

4. The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of his vendee.

Tigress 38

5. Upon the vendor asserting his right to stop in transitu, the master, unless aware of some legal defeasance of such right, is bound to deliver the goods to him; and his refusal so to deliver constitutes "a breach of duty" within the 6th section of the Admiralty Court Act, 1861, for which the ship will be liable *Tigress* 38

BILLS OF LADING—*continued.*

6. A master is justified in delivering goods to the holder of the first bill of lading presented. *Tigress* 38

BOTTOMRY.

1. Where a bottomry bond is made payable upon arrival at the ship's port of destination in England, the validity of the bond is triable by the general maritime law as administered in England, and not by the law of the ship's flag, or the law of the place where the bond was executed.

Hamburg (P. C.) 253

2. The character of agent for the owners of the cargo is imposed upon the master solely by the necessity of the case. The master of a ship, therefore, has not authority to hypothecate the cargo, if in the circumstances of the case it is reasonably practicable for him to communicate with the owners of the cargo before doing so; and if he hypothecates the cargo in such circumstances without so communicating, the bond, though given and taken *bonâ fide*, is not binding upon the cargo *Hamburg* (P. C.) 253

3. A lien on the ship and freight, existing by local law, for advances and commissions, does not convert a transaction on personal credit into a bottomry transaction, so as to render valid a bond subsequently given, or prevent the ordinary reference of the fairness of the commissions to the Registrar and Merchants. *Laurel* 191

The existence of such a local law may be properly pleaded as material evidence to support an allegation that the agreement was to make advances on the credit of the ship and freight, and that the commissions were customary.

Laurel 191

The existence of such a law in a foreign port will be assumed by the Court of Admiralty unless contradicted by plea. If contradicted, either party may produce evidence, the party failing in the particular issue to pay the costs of it *Laurel* 191

4. The master in a port of refuge consigned the vessel to a merchant to advance money for her repairs, the law of the country allowing a lien on the vessel for such advances; no agreement was made at the time whether the advance was to be made on personal security or on bottomry; and the merchant did not himself determine on having bottomry security until shortly before the ship sailed, when he demanded a bond, which the master executed. The Court upheld the bond *Laurel* 317
5. An excessive charge for commissions may be a reason for impeaching a bottomry bond on the ground of fraud, but does not otherwise affect its validity *Laurel* 317

BOTTOMRY—continued.

6. It is proper for the master to advertise previous to taking advances on bottomry; but a bottomry bond is not invalid because of no such advertisement having been made.

Laurel 317

7. The master of a ship putting into a foreign port of distress has not authority to insure the ship or freight for performing the residue of the voyage; and has no authority therefore to grant a bottomry bond on the ship to pay for the premiums of such insurance *Serafina* 277

A bottomry bond to cover payment of premiums for such insurance, stipulated that in case of average or loss of the ship, the lender should obtain reimbursement from the underwriters, and should thence repay himself the premiums of insurance with interest, commission and costs, holding the remainder at the disposal of the master or his principal.—

Semble, that such a bond was also invalid as not being conditioned to bear maritime risk. *Serafina* 277

8. A bottomry bond, if it expresses a maritime risk, is not invalidated by the absence of any provision for maritime interest *Laurel* 317

9. Where the defendant being in adequate possession of the facts, had given his consent to a decree of the Court pronouncing for the validity of a bottomry bond; the Court refused at the defendant's application to rescind the decree, though the facts might possibly raise a valid defence according to a decision pronounced subsequently to the decree.

Glenburn 62

10. The holder of a bottomry bond on ship, freight and cargo is, upon the conclusion of proceedings by default against ship and freight, entitled, as of course, to have the full freight due upon delivery of the cargo paid to him to satisfy the sum secured by the bond with costs, and the owner of the cargo who has paid the freight into Court is not entitled to a reference of the amount due on the bond, notwithstanding that before the execution of the bond part of his cargo was sold by the master, and the proceeds applied to ship's expenses *Gem of the Nith* 72

CARGO, DAMAGE TO. *See* **BILLS OF LADING.**

CAVEAT RELEASE.

A plaintiff filing a caveat release in his own action after a bail bond duly executed, condemned in costs and damages.

Corner 161

CHANNEL.

The channel or water between the Bell Beacon and the buoys of the Queen's channel leading to the port of Liverpool, is not a "narrow channel" within the meaning of the 297th section of the Merchant Shipping Act, 1854.

Mæander (P. C.) 29

CHARTER-PARTY. *See* **BILLS OF LADING**, I. 5; II. 4, 5, 6, 7, 9, 11, 14, 15.

COLLISION.

I. Jurisdiction.

1. By the 24 Vict. c. 10, s. 7, the utmost extent of jurisdiction in cases of collision is given to the High Court of Admiralty.

Malvina (P. C.) 57

The Court of Admiralty has by that statute jurisdiction in a case of damage done by a sea-going vessel to a barge within the body of a county *Malvina* (P. C.) 57

2. The Court of Admiralty has not jurisdiction under 3 & 4 Vict. c. 65, s. 6, or 24 Vict. c. 10, s. 7, or otherwise, to entertain a claim against a steam-tug for damage occasioned to the vessel towed, by negligence in towing, if the damage arises not by collision, but by the vessel taking the ground.

Robert Pow 99

II. Rules, &c.

1. The Admiralty Regulations of 1858, with respect to the exhibition of side lights by sailing vessels, do not require that such lights should be placed on any particular part of the ship; such lights may be carried inboard, provided that they are fairly visible in the appointed directions. Circumstances considered under which the regulations were sufficiently complied with . . . *City of Carlisle* (P. C.) 363

2. On a dark hazy night in the Atlantic, a collision took place between a steamer and a sailing ship. The steamer was steering E. by S. $\frac{1}{2}$ S., and steaming thirteen knots an hour; the sailing vessel was close-hauled on the port-tack, heading N. W., and was going at the rate of seven knots. The mast-head light of the steamer was observed by those on board the sailing vessel on her port bow, distant from two to three miles, and the sailing vessel's helm was then ported. The collision occurred in nine or ten minutes afterwards. The steamer did not observe the sailing vessel until it was impossible to avoid the collision.—*Held*, that under the Rules of the Order in Council, 9th January, 1863, both vessels were to blame: the sailing vessel for altering her course without necessity to avoid immediate danger, and the steamer for going at an undue rate of speed *Great Eastern* (P. C.) 287

3. When a vessel is sailing upon a wind, and passes from one tack to another, the usual mode of effecting this change is by tacking and not by wearing. As vessels which are navigating near the one which is changing her tack, naturally expect that the ordinary method of going about will be pursued, the unusual and therefore unexpected operation of



COLLISION—continued.

wearing ought not to be resorted to unless for some good reason, nor without sufficient sea room for the purpose.

Falkland (P. C.) 204

III. Compulsory Pilotage.

1. In a cause of collision a defendant relying upon the statutory defence (17 & 18 Vict. c. 104, s. 388) that the accident was occasioned by the default of a pilot acting in charge of the ship and employed by compulsion of law, is bound to give strict proof that the collision was occasioned by the pilot's default, and by that only. Where, therefore, the improper navigation of the defendant's vessel consisted in getting under way for the purpose of docking, under circumstances which rendered that proceeding dangerous to other vessels, and the defendant only proved that the pilot, as well as the captain, was on deck giving general orders, but did not prove the particular order, nor produce the pilot as a witness:—*Held*, affirming the judgment of the Court of Admiralty, that the defendant remained liable for the damage *Carrier Dove (P. C.)* 113
2. The words "navigating within," in the 379th section of the Merchant Shipping Act (17 & 18 Vict. c. 104), mean *being within*; and therefore a vessel belonging to the port of London, and coming from a foreign port, is exempted from the employment of a licensed pilot in the river Thames.—*Semble*, that such a vessel is also exempted from compulsory pilotage by the General Pilotage Act (6 Geo. IV. c. 125).
Stettin (P. C.) 199
3. The 374th section of the Merchant Shipping Act, 1854, provides that no licence granted by the Trinity House shall "continue in force beyond the 31st day of January next ensuing the date of such licence; but the same may, upon the application of the pilot holding such licence, be renewed on such 31st day of January in every year, or any subsequent day, by indorsement under the hand of the secretary of the Trinity House, or such other person as may be appointed by them for that purpose."—*Held*, that a pilot's licence, renewed by indorsement made on the 22nd January, operated a renewal from the 31st January, and was therefore in effect on the 6th May following . . . *Beta (P. C.)* 328
4. A vessel ordinarily occupied in the foreign trade, going from Liverpool to London in order to sail from London under advertisement for foreign parts without passengers, but having on board a cargo shipped at Liverpool and deliverable in London, is not "a ship employed in the coasting-trade of the United Kingdom," within the meaning of the 379th section of the Merchant Shipping Act, 1854, and is

COLLISION—continued.

compellable by the 376th section to take a pilot in the London District of the Trinity House . . . *Lloyds, or Sea Queen* 359

IV. Rules as to Damages.

1. Upon a decree pronouncing generally for damages occasioned by a collision, and ordering a reference to the Registrar to assess the amount, the defendant is not liable for such damages as might have been avoided by the exercise of ordinary nautical skill and diligence after the collision on the part of the servants of the plaintiffs in charge of their ship. If upon such reference the plaintiffs present a case of immediate partial damage resulting in the total loss of their ship, and no evidence is given on either side of the pecuniary extent of such partial damage, and the Registrar is of opinion that the plaintiffs are not entitled to recover the total loss upon the ground that by ordinary skill and diligence after the collision they might have avoided it, but are entitled to recover the partial damages, he should not assess the amount of the partial damages conjecturally and report such amount to be due, but should make a special report to the Court; and the Court will then order a further reference to ascertain the amount of the partial damages by evidence. If a collision takes place between two vessels by the negligence of the crew of the defendant's vessel, whereby the plaintiffs' vessel suffers damage and is necessarily run aground, and afterwards and before any expenses are incurred, by the negligence of the plaintiffs' servants a total loss of the plaintiffs' ship ensues, the defendant is not liable for such total loss of the plaintiffs' ship, but is liable for the expense which would have been incurred in making good the partial damage.

Flying Fish (P. C.) 436

2. The Consular Court at Constantinople in 1862 was not a Vice-Admiralty Court, but had a customary jurisdiction in rem in cases of collision.—*Held*, that, if both parties were found to blame, the Admiralty rule of dividing damages should be applied *Laconia* (P. C.) 117

V. Limited Liability of Shipowners.

1. The 54th section of the 25 & 26 Vict. c. 63, with respect to limited liability, applies equally to British and foreign ships. The owner of a British ship, sued (in rem) by the owner of a foreign ship for damages occasioned by a collision between the two ships on the high seas, is entitled to limited liability *Amalia* (P. C.) 151
2. The owner may claim limited liability without admitting that the negligence of his servants contributed to the collision.

Amalia (P. C.) 151

COLLISION—*continued.*VI. *Pleading and Practice.*

1. In a cause of collision the plaintiff is only entitled to recover *secundum allegata et probata* .. *Haswell* (P. C.) 247
2. Where the plaintiffs pleaded that the collision was caused by the defendants' vessel having "suddenly put her helm a starboard;" and the evidence given in support of the petition was that the collision was caused by the defendants' vessel having ported instead of continuing under a starboard helm.—*Held*, by the Court of Appeal, affirming the judgment of the Court below, that the evidence could not be applied to the statement in the petition, and that the plaintiffs, therefore, were not entitled to recover.
Haswell (P. C.) 247
3. The plaintiffs, in a cause of collision, alleged in their petition, in two separate articles, that the helm of the defendants' vessel was not duly ported, and was improperly starboarded. They also produced witnesses who deposed that the defendants' vessel had starboarded, and that the collision was thereby occasioned. The finding of the Court was, that the collision was occasioned by the helm of the defendants' vessel not having been duly put to port.—*Held*, that the plaintiffs were not barred from recovering by the rule confining the plaintiffs' right to recover *secundum allegata et probata* *Amalia* 311
4. In a cause of collision, where the defendant admits in the pleadings that his ship, when under way, ran into a vessel at anchor, but denies that the vessel at anchor was the vessel of the plaintiff, the plaintiff must begin and prove his case.
Earl of Leicester 188
5. The Court of Admiralty will admit in evidence a light-ship log, on production by the officer of the Trinity House, in whose custody such logs are kept, without requiring the evidence of the person who made the entries. Such logs permitted to be proved by examined copies.
Maria Das Dores 27
6. A ship having been released from arrest upon bail given in the full sum in which the cause was instituted, cannot be re-arrested by the plaintiff to answer his damages, if, after the ordinary decree and reference, they prove to exceed that sum: and if the ship has been sold by the Court in another action brought by other parties, the Court cannot, under its general authority, or under the 15th section of the Admiralty Court Act, 1861, order the proceeds of the ship to be applied to satisfy such damages or interest, or costs.
Wild Ranger 84

COLLISION—continued.

7. In causes of collision, where the Court finds inevitable accident, the general rule is that each party pays his own costs; but the Court still holds, and will on occasion exercise, the power to condemn the plaintiff in costs .. *London* 82
8. In a cause of collision, instituted on behalf of her Majesty in her office of Admiralty and of the commander and crew of one of her Majesty's ships, against a private shipowner, the Court, on finding for the defendant, declined to condemn the Crown in costs, but condemned the commander and crew to pay the whole of the costs *Leda* 19
9. Co-plaintiffs are severally liable to the whole of the costs. *Leda* 19

CONFLICT OF LAWS.

1. If a bill of lading is given by the master of a foreign vessel, the agreements to be implied as to the duty of the master to carry on, trans-ship, or deliver the goods at an intermediate port of refuge will be ascertained by reference to the law of the flag which the vessel carried, and not by reference to the *lex loci contractus* or the *lex fori*, or the law of the place where the breach of contract by the master is alleged to have been committed *Bahia* 292
2. Where a bottomry bond is made payable upon arrival at the ship's port of destination in England, the validity of the bond is triable by the general maritime law as administered in England, and not by the law of the ship's flag, or the law of the place where the bond was executed.
Hamburg (P. C.) 253

And see COLLISION, IV. 1, 2; V. 1.

CONSULAR JURISDICTION.

1. As between two Christian states, all claims for cession of jurisdiction or exemption from jurisdiction within the other require, generally, at least, the sanction of a treaty; but such may, nevertheless, be proved by evidence of consent otherwise, and such consent may be expressed by usage and conscious acquiescence, especially in transactions with Oriental states *Laconia* (P. C.) 117
2. The Ottoman Government has for a long time acquiesced in allowing to the British consular authorities in Turkey a jurisdiction between British subjects and the subjects of other Christian states. Such acquiescence of the Ottoman Government does not vest a compulsory power in a British Court in Turkey over the subjects of other foreign states; but the foreigner may voluntarily submit to its jurisdiction with the consent of his sovereign .. *Laconia* (P. C.) 117

CONSULAR JURISDICTION—*continued.*

3. The effect of the 6 & 7 Vict. c. 94, is to make the jurisdiction of the British consular authority in the Ottoman Empire liable to be regulated by Order in Council; and the Order in Council, 27th August, 1860, provides for the exercise of such jurisdiction in suits between British subjects and the subjects of foreign states. . . *Laconia* (P. C.) 117
4. The nature and extent of the consular jurisdiction must be solved by reference to usage. The Consular Court has exercised a customary jurisdiction in rem in cases of bottomry, whence the right to exercise a similar jurisdiction in cases of collision may be inferred. . . *Laconia* (P. C.) 117
5. The jurisdiction being in rem, the rules applying to actions in rem apply rather than the rules of the English common law in personal actions; and, therefore, if both parties are to blame for a collision, the damages ought to be divided.
Laconia (P. C.) 117
6. The Order in Council, 9th January, 1863, confirms rather than confers the Admiralty jurisdiction of the Consular Court at Constantinople *Laconia* (P. C.) 117
7. The protest by a foreign consul against the continuance of a wages cause against a foreign vessel does not deprive the Court of jurisdiction; but the Court will use its discretion whether or not to exercise its jurisdiction . . . *Octavie* 215
8. Upon the Belgian Consul protesting on the ground "that, in his opinion, the cause ought to be settled by Belgian Courts of Law," and the ship being laden ready for a voyage to Ostend, the Court dismissed the suit of the Belgian master.
Octavie 215

COSTS.

Co-plaintiffs are severally liable for the whole of the costs.

Leda 19

COSTS AND DAMAGES.

1. A plaintiff filing a caveat release in his own action after a bail bond duly executed, condemned in costs and damages.
Corner 161
2. A vessel having been arrested in a cause of collision, and the suit having been dismissed with costs, the plaintiff obtained leave to detain her for twelve days, that he might have time to consider whether he would appeal. On the thirteenth day the vessel was released.—*Held*, that the defendant was entitled to damages for the twelve days' detention.
Cheshire Witch 362

CROWN.

1. The 18 & 19 Vict. c. 90, authorizing costs to be given to or against the Crown, applies only to proceedings in which the Attorney-General or Lord Advocate is a party.

Leda 19

2. In a cause of collision instituted on behalf of her Majesty in her office of Admiralty, and of the commander and crew of one of her Majesty's ships, against a private shipowner; the Court, on finding for the defendant, declined to condemn the Crown in costs, but condemned the commander and crew to pay the whole of the costs *Leda* 19

DAMAGES. See MEASURE OF DAMAGES.

DOMICILE.

Where the Admiralty Court Act, 1861, confers a right to sue the ship, unless the owner is "domiciled" in England or Wales at the date of the institution of the cause, the word *domiciled* is to be taken in its legal sense. The fact that the owner is at such date out of England and Wales is immaterial, if he be "domiciled" there .. *Pacific* 243

FOREIGN LAW. See BILLS OF LADING, II. 1—BOTTOMRY, 1, 2, 3, 4—COLLISION, V. 1.

FREIGHT. See AFFREIGHTMENT, 1, 2, 3, 4, 5—BILLS OF LADING, II. 1, 2, 3, 6, 14, 15—BOTTOMRY, 10.

GENERAL AVERAGE. See AFFREIGHTMENT, 2—BILLS OF LADING, II. 3, 14, 15.

INSURERS.

1. The former practice of the Court was to permit only the master or owners of a ship arrested to appear and defend. But the Court will allow the insurers of the ship to defend (on terms) if they show a substantial interest which may be prejudiced by the plaintiff proceeding to judgment.

Regina del Mare 315

2. A ship having been arrested in a cause instituted in the Admiralty Court, and the owners not appearing, the foreign insurers then entered an appearance and applied for leave to defend, upon the ground that if the ship was sold by the Court, they might be made responsible to the owner for a total loss. The Court granted the application upon their giving security for costs *Regina del Mare* 315

3. In another action brought for necessities against the same ship, no appearance having been entered for the owner, the same insurers appeared and paid the amount of the claim into Court, making at the same time an offer to pay costs. The Court rejected a motion on behalf of the plaintiff to sell the ship as for want of appearance.. *Regina del Mare* 315

JETTISON. See **BILLS OF LADING**, II. 14, 15.

JOINT CAPTURE. See **SLAVE BOUNTIES**.

JURISDICTION. See **BILLS OF LADING**, I.—**COLLISION**, I.—**MASTER'S WAGES**—**NECESSARIES**—**SALVAGE**, III., IV.

LIEN.

1. The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender from the debtor of the sum really due; but if the demand of the larger sum be so made that it amounts to an announcement that it is useless to tender any smaller sum,—*Held*, affirming the judgment of the Admiralty Court, that this dispenses with any tender, even if it appears that the debtor was unwilling to tender the amount really due *Norway* (P. C.) 404
2. A creditor having a lien upon a debtor's goods for an unliquidated amount, that amount being dependent upon a complicated account, the particulars of which are partly in possession of the creditor alone, the creditor waives any tender for the amount really due, if on demand of the goods he wilfully withholds from the debtor the information, including papers necessary to enable him to ascertain the amount due *Norway* 377
3. The Court of Admiralty is bound to recognize a possessory lien for freight and general average contribution.

Cargo ex Galam (P. C.) 167

See **AFFREIGHTMENT** — **MARITIME LIEN** — **PRECEDENCE OF LIENS**—**SALVAGE**.

LIEN FOR FREIGHT. See **AFFREIGHTMENT**—**BILLS OF LADING**, II. 1, 2, 14, 15.

LIGHT-SHIP LOG.

The Court of Admiralty will admit in evidence a light-ship log, on production by the officer of the Trinity House, in whose custody such logs are kept, without requiring the evidence of the person who made the entries. Such logs admitted to be proved by examined copies . . . *Maria Das Dores* 27

LIMITED LIABILITY OF SHIPOWNERS.

1. The 54th section of the 25 & 26 Vict. c. 63, with respect to limited liability, applies equally to British and foreign vessels. The owner of a British ship sued (in rem) by the owner of a foreign ship for damages occasioned by a collision between the two ships on the high seas, is entitled to limited liability *Amalia* (P. C.) 151
2. The owner may claim limited liability without admitting that the negligence of his servants contributed to the collision.

Amalia (P. C.) 151

LIMITED LIABILITY OF SHIPOWNERS—continued.

3. Unregistered as well as registered owners are entitled to limited liability under the statute.

Spirit of the Ocean 336

4. If the loss is occasioned by the actual fault of one of several part-owners, his co-owners are not thereby precluded from a right to the limited liability given by the statute.

Spirit of the Ocean 336

5. On the 24th July, Cary junior, a registered part-owner of a vessel, transferred his shares, by bill of sale, to Cary senior. This bill of sale was not registered until after the 22nd November, on which day a collision took place, Cary junior being on board and in command of the vessel as master. It was not denied that he personally was in fault. On a cause for limited liability being instituted by Cary senior, and by all the registered owners of the vessel except Cary junior:—*Held*, that they were all entitled to the privilege of limited liability given by the statute.

Spirit of the Ocean 336

MARITIME LAW. See BOTTOMRY, 1—COLLISION, V.**MARITIME LIEN.**

1. A maritime lien follows the ship into whosoever hands she may pass, and may be enforced after a considerable lapse of time; but to affect the rights of third persons, reasonable diligence in its enforcement must be used, otherwise the lien may be lost. Reasonable diligence means, not the doing of everything possible, but of that which, having regard to all the circumstances, including consideration of expense and difficulty, can be reasonably required.

Europa (P. C.) 89

Maritime lien allowed under the circumstances to be enforced three years after it accrued .. *Europa* (P. C.) 89

2. A master delayed to enforce his maritime lien for wages against the ship for ten months after his discharge. In the interim the ship had been mortgaged without notice of his claim.—*Held*, that he was not estopped from enforcing his claim *Chieftain* 212
3. A master was hired by one who had fraudulently obtained possession of the ship, and discharged his duties in ignorance of his employer's fraud:—*Held*, that he had a maritime lien on the ship for his wages and disbursements .. *Edwin* 281
4. The release by the master of his right of action against the shipowners for wages does not operate as a release of the ship from his lien for such wages *Chieftain* 212

MASTER, DUTY OF. *See* AFFREIGHTMENT—BILLS OF LADING, II.—BOTTOMRY—STOPPAGE IN TRANSITU.

MASTER, REMOVAL OF.

The Court of Admiralty has power, under the 240th section of the Merchant Shipping Act, 1854, to remove the master of a ship, upon the application of any owner or part-owner, if it is satisfied that such removal is necessary:—*Held*, that the removal was “necessary,” where the master had committed a fraudulent breach of trust against his owners, by making a payment of 5*l.* on ship’s account, and fraudulently claiming 25*l.* of the owners. The Court will make the order of removal on the application of one part-owner only, notwithstanding another part-owner (the ship’s husband) is dissentient *Royalist* 46

MASTER’S LIEN FOR WAGES AND DISBURSEMENTS.

1. *Held*, that a master did not lose his lien upon a ship for wages due by delaying to enforce such lien for ten months after his discharge, notwithstanding he had an opportunity to do so.—*Held*, also, that a master may enforce such lien against persons who as mortgagees had in the interim become interested in the ship without notice of the lien.

Chieftain 212

2. *Seemle*, by operation of 4 Anne, c. 16, s. 17, and the 191st section of the Merchant Shipping Act (17 & 18 Vict. c. 104), the master of a ship has, like other seamen, six years to bring his suit for wages in the Admiralty Court.

Chieftain 212

3. The fact that the master was hired by one who had fraudulently obtained possession of the ship will not prevent the master having a lien upon the ship for his wages and disbursements, if he has discharged his duties in ignorance of the fraud *Edwin* 281

4. The master’s lien under 24 Vict. c. 10, s. 10, for disbursements on ship’s account does not include a lien for mere liabilities, as upon a bill of exchange drawn by him upon the owner and dishonoured *Chieftain* 104

Edwin . . 281

5. A master is entitled to sue the ship for wages as “earned on board the ship” within the 10th section of the Admiralty Court Act, 1861, if he performed the duties of master, although during his service he did not sleep on board the ship, and many of his duties were performed on shore.

Chieftain 104

He may also sue for disbursements made by him during such service on the ship’s account *Chieftain* 104

6. The claim of a master for wages and disbursements preferred to the claim of a mortgagee *Chieftain* 104

MEASURE OF DAMAGES.

1. In case of injury to goods by improper stowage, the merchant cannot recover against the shipowner loss upon a contract of re-sale, of which he (the shipowner) had no notice at the time of shipment *St. Cloud* 4
2. In cases brought in the Admiralty Court under 24 Vict. c. 10, the damages will be referred to the Registrar and Merchants, with instructions to follow the rules of the Courts of Common Law as to the measure of damages.. *St. Cloud* 4

MORTGAGEE.

The second mortgagee of $\frac{3}{4}$ th shares of a vessel instituted a cause under the 11th section of the Admiralty Court Act, 1861, and arrested the ship. He afterwards withdrew the suit. The owner of the remaining shares (who was not mortgagor to the plaintiff) thereupon applied to the Court to condemn the plaintiff in costs and damages.—*Held*, that he was entitled to his costs of suit, but not to any damages occasioned by the arrest and detention of the vessel.

Volant 321

See PRECEDENCE OF LIENS.

NATIONALITY OF SHIP. See SHIP.

NECESSARIES.

1. A ship if beneficially owned by foreigners at the date of the supply of necessities, but carrying a British flag and register, is a foreign ship within the meaning of the statute 3 & 4 Vict. c. 65, s. 6 *Princess Charlotte* 75
2. A claim for necessities supplied to a foreign ship may be enforced by proceedings in rem under the 6th section of the 3 & 4 Vict. c. 65, notwithstanding a subsequent bonâ fide transfer to a British owner; and this remedy is not taken away by the 5th section of the Admiralty Court Act, 1861, though the British owner be domiciled in England at the time of the institution of the cause .. *Ella A. Clark* 32
3. The 5th section of the Admiralty Court Act, 1861, does not apply to ships foreign-owned at the time when the necessities were furnished *Ella A. Clark* 32
4. Under the 5th section of the Admiralty Court Act, 1861, the party supplying necessities to a ship acquires no maritime lien, but only a right to sue the ship: his claim against the ship accrues only upon his institution of the suit, and is therefore subject to any registered mortgage at that time subsisting on the ship *Pacific* 243

POSSESSION FEES—continued.

sold by order of the Court.—*Held*, that the plaintiffs were only entitled to the nett proceeds of the ship (i. e. the gross proceeds less possession fees and marshal's charges), together with costs of suit and interest, the amount of interest to be referred to the Registrar *Europa* 210

PRACTICE.**I. Pleading.**

1. The Court will not, at the hearing of a cause of collision, allow a plea to be added, alleging that the vessel proceeded against was in charge of a licensed pilot, and that the accident was caused by his default *Alhambra* 286
2. Where the Plaintiffs pleaded that the collision was caused by the defendants' vessel having "suddenly put her helm a starboard," and the evidence given in support of the petition was that the collision was caused by the defendants' vessel having ported, instead of continuing her course under a starboard helm:—*Held*, by the Court of Appeal, confirming the judgment of the Court below, that the evidence could not be applied to the statement in the petition, and that the Plaintiffs were therefore not entitled to recover. *Haswell* (P. C.) 247
3. The plaintiffs, in a cause of collision, alleged in their petition, in two separate articles, that the helm of the defendants' vessel was not duly ported, and was improperly starboarded. They also produced witnesses who deposed that the defendants' vessel had starboarded, and that the collision was thereby occasioned. The finding of the Court was, that the collision was occasioned by the helm of the defendants' vessel not having been duly put to port:—*Held*, that the plaintiffs were not barred from recovering by the rule confining the plaintiffs' right to recover *secundum allegata et probata* *Amalia* (P. C.) 311

II. Evidence.

1. The Rules of 1859 do not abridge the discretion of the Judge of the Admiralty Court to admit fresh evidence on an appeal from a report of the Registrar; but such discretion is to be exercised with great caution, and with a careful regard to the peculiar circumstances of each case. *Flying Fish* (P. C.) 436
2. The log of a light-ship kept officially may be admitted in evidence, and may be proved by an examined copy. *Maria Das Dores* 27

III. Miscellaneous.

1. The amount in which a cause has been instituted, may, by permission of the Court, be increased before the hearing. *Mæander* (P. C.) 29

PRACTICE—*continued*.

2. The præcipe to institute an action having been by mistake entered in a smaller sum than that intended, the defendant's ship was arrested and bailed in that sum. On the mistake being discovered before the hearing of the cause, the Court gave permission (on payment of costs occasioned by the mistake) for the præcipe to be amended, and the defendant's ship to be re-arrested *Hero* 447
3. The practice in the Admiralty Court is for the original owners of maritime property to be the parties in a cause, although they have abandoned the property to underwriters and received from them payment as for a total loss.
Cargo ex Galam (P. C.) 167
4. The former practice of the Court was to permit only the master or owners of a ship arrested to appear and defend. But the Court will allow the insurers of the ship to defend (on terms) if they show a substantial interest, which may be prejudiced by the plaintiff proceeding to judgment.
Regina del Mare 315

A ship having been arrested, and the owners not appearing, the foreign insurers entered an appearance and applied for leave to defend, upon the ground that if the ship were sold by the Court, they might be made responsible to the owner for a total loss. The Court granted the application upon their giving security for costs. . . *Regina del Mare* 315

In another action brought for necessities against the same ship, no appearance having been entered for the owner, the same insurers appeared and paid the amount of the claim into Court, making at the same time an offer to pay costs. The Court rejected a motion on behalf of the plaintiff to sell the ship as for want of appearance. . . *Regina del Mare* 315
5. Where the defendant, being in adequate possession of the facts, gave his consent to a decree of the Court pronouncing for the validity of a bottomry bond, the Court refused, at the defendant's application, to rescind the decree, though the facts might possibly raise a valid defence according to a decision pronounced subsequently to the decree *Glenburn* 62
6. If the Court has not in fact jurisdiction, a defendant is not prejudiced by an absolute appearance . . . *Eleonore* 185
7. A. sued the ship for damages occasioned by a collision; the ship was released on bail being given in the amount of the action. B. also sued the ship; the ship was sold by order of the Court, and after satisfying B.'s claim, part proceeds of the ship remained in the Registry. A.'s claim was pronounced for, and on investigation proved to exceed the

PRACTICE—*continued.*

- amount of the bail.—*Heid*, that the Court could not, under its general authority, or under the 15th section of the Admiralty Court Act, 1861, order the proceeds remaining in the Registry to be applied to satisfy A.'s damages, or interests or costs *Wild Ranger* 84
8. A vessel having been arrested in a cause of damage, and the suit having been dismissed with costs, the plaintiff obtained leave to detain her for twelve day, that he might have time to consider whether he would appeal. On the thirteenth day the vessel was released.—*Held*, that the defendant was entitled to damages for the twelve days' detention *Cheshire Witch* 362
9. In the case of the witnesses being foreign seamen, a reasonable charge incurred for agency or interpretation may be allowed *Karla* 367
10. A party in a cause is not bound to examine any of his witnesses before the hearing; and if judgment is given in his favour with costs, he is in general entitled, with respect to seamen who are reasonably detained by him as necessary witnesses, to the expenses of maintaining them to the time of the hearing *Karla* 367

PRECEDENCE OF LIENS.

1. In November, 1861, A. supplied necessities to a ship registered in England. On the 12th December, 1861, B. became a registered mortgagee of the ship, and A. subsequently instituted a cause of necessities against the ship.—*Held*, that the mortgage of B. had priority over the claim of A. for necessities *Pacific* 243
2. A cargo which had been discharged from a condemned French vessel was lying in the island of Terceira. The owner in England chartered a ship for a lump sum to go out and bring the cargo to one of several ports (according to orders to be given at Scilly or Falmouth, the port of call); one of these ports was Hamburgh. In accordance with this charter the ship proceeded to Terceira, and took on board the cargo, upon which, unknown to the shipowner, who also acted as master, there was a respondentia bond given to pay other expenses than the expenses of carrying on, and made payable at Falmouth, which was not one of the ports of destination specified in the charter. In the voyage to England the ship was stranded at Scilly, and general average expenses were incurred, and the cargo was landed and stored (23rd February) in the shipowner's name. The charterer, who was aware of the bond, ordered the shipowner (25th February) to carry the cargo to Hamburgh. Thereupon

PRECEDENCE OF LIENS—*continued.*

the cargo was arrested by Admiralty warrant (4th March) at the suit of the respondentia bondholder. The owner not appearing, nothing was done by any party until the 23rd May, when the cargo was removed to London by order of the Court, and then sold. The shipowner, however, in the meanwhile, settled with his underwriters on ship and freight, upon the terms of a total loss. The legal origin of the bond was not disputed.—*Held*, reversing the decision of the Admiralty Court, that the shipowner was prevented from carrying on the cargo by the default of the owner; that he therefore had a possessory lien on the cargo for his full freight and general average; and that such lien must be satisfied in preference to the respondentia bond, upon the ground that so carrying the cargo, the shipowner had rendered services in the nature of salvage to the bond.

Cargo ex Galam (P. C.) 167

3. The claim of a master for wages and disbursements preferred to the claim of a mortgagee . . . *Chieftain* 104

PROCEEDS.

1. Where a ship has been sold by order of the Court, and the proceeds are in the registry, such proceeds are not "money belonging to the owner of the ship" (1 & 2 Vict. c. 110, s. 12), nor a "debt owing" to them (17 & 18 Vict. c. 125, s. 61) . . . *Wild Ranger* 84
2. In a cause of collision, the ship was liberated on bail; the damages proved to exceed the amount of such bail. In another action brought by other parties the ship was sold, and their claim having been satisfied, a balance remained in the registry.—*Held*, that the Court could not, under its general authority or under the 15th section of 24 Vict. c. 10, order such balance to be applied in satisfaction of the damages, interest or costs in the collision cause.

Wild Ranger 84

RE-ARREST.

The præcipe to institute a cause having been by mistake entered in a smaller sum than that intended, the defendant's ship was arrested and bailed in that sum. On the mistake being discovered before the hearing of the cause, the Court gave permission to the plaintiff, on payment of costs occasioned by the mistake, to amend the præcipe, and re-arrest the defendant's ship . . . *Hero* 447

REASONABLE TIME. *See Bahia*, 292.

REGISTER.

The 107th section of the Merchant Shipping Act, 1854, makes the register *primâ facie* proof of disputed British nationality; but such inference may be overborne by circumstantial evidence to the contrary . . . *Princess Charlotte* 75

RULES.

- Admiralty Court Rules (1859), 10 *Octavie* 215
 42, 43, 51, 54 .. *Corner* 161

SALVAGE.

I. *Life Salvage.*

1. The words "persons belonging to such ship," in the 458th section of "The Merchant Shipping Act, 1854," include passengers *Fusilier* (P.C.) 341
2. The owners of the cargo of a vessel to which salvage services have been rendered are liable under the 458th section of "The Merchant Shipping Act, 1854," to contribute to that portion of the claim of the salvors which arises from the saving of the lives of persons belonging to the ship.
Fusilier (P. C.) 341
3. The Mersey Docks and Harbour Board, acting in pursuance of enabling powers given them by their Dock Act (21 & 22 Vict. c. xcii. s. 109), entered into an agreement with certain steam-tug companies at Liverpool, whereby the companies undertook that at all times, in day and night, one of certain specified steam-tugs should always be in readiness to proceed, and should, on signal given, proceed with one of the Liverpool life-boats to any ship in distress within certain limits, the Board contracting to pay fifteen guineas for each occasion. The agreement contained a proviso, that nothing contained in the agreement should prejudice or affect the rights of the steam-tug companies in regard to services in saving ships or other property to be rendered by their steamers. One of the steam-tugs specified, belonging to one of the companies, in pursuance of a direction received from the mate of the landing-stage, who was a servant of the Dock Board, towed out a life-boat to a vessel in distress, and brought the master and crew into Liverpool, then returned and brought the ship and cargo in also. In an action for salvage against ship and cargo, instituted by the owners, master and crew of the tug,—*Held*, that the agreement between the Dock Board and the tug companies did not bar or affect the plaintiffs' claim to reward for salvage of life *Pensacola* 306

II. *Salvage supervening Towage.*

- A tug engaged under the ordinary contract to tow, may, by the performance of substantial salvage services in saving the ship towed from supervening danger, earn salvage reward, though not herself incurring risk *Pericles* 80

SALVAGE—continued.

III. *Summary Jurisdiction of Magistrates.*

1. "The Merchant Shipping Act, 1854," and the Amendment Act, 1862, combined, take away the jurisdiction of the Admiralty Court from all cases of salvage, whether rendered within the United Kingdom or not, in which the sum claimed does not exceed 200*l.*, or in which the value of the property saved does not exceed 1,000*l.*

William and John 49

2. The words "sum claimed" in sect. 460 of "The Merchant Shipping Act, 1854," mean sum claimed by the salvors *before* any legal proceedings are taken .. *William and John* 49

3. Where the value of the property saved does not exceed 1,000*l.* the Court will, notwithstanding an absolute appearance has been given by the defendant, refuse to proceed in the salvage suit, on the ground that the statutes prohibit the Court to exercise jurisdiction *Louisa* 59

4. It is immaterial to this question that the party defending is the mortgagee, and not the owner of the ship. The word "owners" in 17 & 18 Vict. c. 104, s. 460, if necessary, extends to all persons interested in the property.. *Louisa* 59

5. An agreement between the salvors and shipowner as to remuneration does not give the Court of Admiralty jurisdiction; but may induce the Court to grant a certificate for costs, where the suit is duly brought for an amount exceeding 200*l.*, and a smaller sum is decreed to the salvors.

William and John 49

6. By the 460th section of "The Merchant Shipping Act, 1854," and the 49th section of the Amendment Act, 1862, the Court of Admiralty has not jurisdiction to determine and award the amount of salvage due, if the value of the property saved is proved not to exceed 1,000*l.*, but, nevertheless, it retains jurisdiction to condemn in costs and damages salvors so wrongfully arresting property and for other collateral purposes *Kate* 218

7. No general rule can be laid down as to condemning salvors in costs and damages for arresting in the Admiralty Court property of less value than 1,000*l.* *Eleonore* 185

8. The fact that the arrest was made without verbal claim, and for a sum disproportionate to the value of the property and the services rendered, will be evidence that the arrest was made negligently *Eleonore* 185

9. The Court will not decree for damages unless the circumstances show *mala fides* or *crassa negligentia* on the part of

SALVAGE—continued.

the salvors in arresting, whereof the fact that the salvors arrested without first obtaining a valuation of the property from the receiver of wreck (as provided for by sect. 50 of 25 & 26 Vict. c. 63) is not conclusive evidence. *Kate* 218

IV. Appeal from Justices.

1. The 464th section of the Merchant Shipping Act provides, that no appeal shall be allowed from a salvage award of justices "unless the sum in dispute exceeds 50*l.*"—*Held*, that the "sum in dispute" means the sum claimed by the salvors *Mary Anne* 334

Salvors sent in a formal demand in writing for 40*l.*; on being refused, they claimed before the justices "a sum not exceeding 200*l.*" The justices found no salvage was due; the salvors appealed to the Admiralty Court.—*Held*, that "the sum in dispute" was the 40*l.* thus claimed, and that therefore the Admiralty Court had no jurisdiction to entertain the appeal *Mary Anne* 334

2. The words "sum in dispute" in the 464th section of the Merchant Shipping Act, 1854, do not mean the sum awarded by the justices and appealed against; and where the only evidence of the sum in dispute is that the salvors claim before the justices "a certain amount of salvage not exceeding 200*l.*," an appeal from the award of the justices lies to the Admiralty Court .. *Andrew Wilson* 56

V. Miscellaneous.

1. The value of the salvors' property endangered in the service does not limit their salvage remuneration to that sum.

Fusilier (P. C.) 341

2. In the case of a derelict the salvors have a right to exclusive possession of the vessel; but unless the vessel has been utterly abandoned, and is in contemplation of law a derelict, the occupying salvors are bound to give up charge to the master on his appearing and claiming charge; and the master may then refuse to continue to employ them, and may employ others, and may take what measures he thinks fit for the preservation of the vessel .. *Champion* 69

A vessel having run on shore, and been got off water-logged and disabled, was anchored, and the master then quitted with all his crew to obtain assistance. On the next day he returned with a steamer, and found that salvors had just taken possession.—*Held*, that the vessel was not a derelict, and that the master was entitled to resume full authority.

Champion 69

SALVAGE—continued.

3. Ship and cargo must each pay its own share of salvage; neither can be made liable for the salvage due from the other; whether the salvors proceed in the Admiralty Court, or before the local magistrates *Pyrennee* 189
4. In order to deprive a seaman of his right to share in salvage, neither the agreement for the vessel to be employed in salvage services, nor the stipulation that the seaman shall waive his claim for salvage need be in writing to satisfy the 18th section of "The Merchant Shipping Amendment Act, 1862," but both must be clearly proved by those who dispute the seaman's right *Pride of Canada* 208
5. On suits by rival salvors being heard together, the witnesses called on behalf of one set of salvors will be liable to cross-examination, first on behalf of the rival plaintiffs, and then on behalf of the defendants *Philadelphia* 28

SHIP (NATIONALITY OF).

A ship's register containing a statement of British ownership, even if by the 107th section of the Merchant Shipping Act, 1854, made *prima facie* proof of such ownership, may be outweighed by circumstantial evidence to the contrary.
Princess Charlotte 75

SLAVE BOUNTIES.

1. The governor of a colony, being the person to whom the general management of the colony is entrusted, is the person entitled to the bounties payable in respect of a seizure of slaves, even though he is absent from the colony at the time the seizure is made *Sierra Leone Case* 148
2. A Queen's ship, which is authorized to capture slave ships, being in sight during the chase and capture by another ship of war of a vessel equipped for the slave trade, is entitled to share as joint captor in the tonnage bounties awarded under 1 & 2 Vict. c. 47, unless the *animus capiendi* is clearly rebutted. In establishing a claim to joint capture of a vessel equipped for the slave trade, proof that the alleged joint captor was seen by those on board the prize before capture is important, but is not absolutely required as in cases of prize of war. At daylight on a morning nearly calm, her Majesty's steamships *Falcon* and *Dart* were in company, each under canvas only; each had authority to capture vessels engaged in the slave trade; but the *Falcon* was on her voyage home. A vessel, which afterwards proved to be equipped for the slave trade, appeared in sight of both ships: the *Dart* got up steam and went in chase. The captain of the *Falcon*, deeming the

SLAVE BOUNTIES—*continued.*

Dart sufficient for the purpose, did not get up steam, but continued his course. The chase lasted a few hours only; and the capture by the Dart took place in daylight, in sight of those on deck of the Falcon, at the distance of about seven miles. The prize was destroyed as unseaworthy. Proceedings of adjudication subsequently took place, and bounties were awarded under the 2 & 3 Vict. c. 73; 1 & 2 Vict. c. 47, s. 2.—*Held*, that the Falcon was entitled to share as joint captor. *Brig, name unknown* 370

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4 Anne, c. 16, s. 17— <i>Chieftain</i>	212
7 Geo. I. c. 21, s. 2— <i>India</i>	221
5 Geo IV. c. 113, ss. 26, 28, 38— <i>Slave Bounties Case</i>	..			148
6 Geo. IV. c. 125, s. 59— <i>Stettin</i> (P. C.)		199
11 Geo. IV. & 1 Will. IV. c. 55, s. 1— <i>Slave Bounties Case</i>				148
1 & 2 Vict. c. 47, s. 2— <i>Brig, name unknown</i>		370
1 & 2 Vict. c. 110, s. 12— <i>Wild Ranger</i>		84
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3 & 4 Vict. c. 65, s. 6— <i>Ella A. Clark</i>		32
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„		<i>Spirit of the Ocean</i>	336
„	s. 67—	<i>Norway</i>	377, 404

STATUTES.

I. *Repeal.*

1. No statute can lose its force by non-user alone. Presumption is against repeal of a statute by implication; but a subsequent statute, though not expressly referring to it, will be taken to have repealed a prior one if the provisions of the two statutes are incompatible with each other, or would lead to absurd consequences *India* 221

2. The 7 Geo. I. c. 21, s. 2, prohibiting loans of bottomry by British subjects, upon foreign ships engaged in the East India trade, is repealed *India* 221

II. *Retrospective operation of* *Idas* 65

STOPPAGE IN TRANSITU.

1. A merchant who purchases goods on his own credit for another, to whom he indorses a bill of lading of the goods, stands, for the purpose of stoppage in transitu, in the position of vendor; and the indorsement by him of one bill of lading to the vendee does not of itself defeat his right to stop in transitu *Tigress* 38

STOPPAGE IN TRANSITU—continued.

2. The vendor claiming to stop need not represent to the master that the bill of lading is still in the hands of his vendee.

Tigress 38

3. Upon the vendor asserting his right to stop in transitu, the master, unless aware of some legal defeasance of such right, is bound to deliver the goods to him; and his refusal so to deliver constitutes a "breach of duty" within the 6th section of the "Admiralty Court Act, 1861," for which the ship will be liable *Tigress* 38

4. A master is justified in delivering goods to the holder of the first bill of lading presented *Tigress* 38

5. If the vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, indorses and delivers it to a banker as a security for past and future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods in transitu.

Marie Joseph (P. C.) 449

6. The vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, and having given an acceptance for the price, returned the bill of lading to the vendor to hold "as security against the acceptance until the goods are sold or the vessel arrives," and afterwards, by fraudulent representation, again obtained possession of the bill of lading from the vendor, and negotiated it by indorsement and delivery to a third person, who took without notice of the fraud:—*Held*, reversing the judgment of the Admiralty Court, that the vendee's fraud did not vitiate his power to pass a good title to a third person by indorsement, and that the right of such third person under the indorsement should prevail against the claim of the unpaid vendor to stop the goods in transitu.

Marie Joseph (P. C.) 449

TENDER.

1. A tender of money due may be waived by the creditor persisting in making an excessive demand, and refusing to listen to any proposition to take less *Norway* 377, 404

2. A creditor having a lien upon a debtor's goods for an unascertained amount, dependent upon a complicated account, the particulars of which are partly in the possession of him, the creditor, alone, will be held to waive any tender for the amount really due, if on demand of the goods he wilfully withholds from the debtor the information (including papers) necessary to enable him to ascertain the amount due *Norway* 377

TENDER—continued.

3. The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender from the debtor of the sum really due; but if the demand of the larger sum be so made that it amounts to an announcement that it is useless to tender any smaller sum:—*Held*, that this dispenses with any tender, even if it appears that the debtor was unwilling to tender the amount really due .. *Norway* 377, 404

USAGE.

Laconia (P. C.).. .. . 117

WAGES.

1. The protest by a foreign Consul against the continuance of a wages cause against a foreign vessel does not deprive the Court of jurisdiction; but the Court will use its discretion whether or not to exercise its jurisdiction .. *Octavie* 215
2. Upon the Belgian Consul protesting on the ground "that in his opinion the cause ought to be settled by Belgian Courts of Law," and the ship being laden ready for a voyage to Ostend, the Court dismissed the suit of the Belgian master for his wages *Octavie* 215
3. If there be a doubt as to the interpretation of a seaman's contract, the contract is to be interpreted favourably to the seaman *Nonpareil* 355

A seaman signed articles at New York to serve on board a British ship on a voyage to terminate either in the United States or in the United Kingdom, "amount of wages per month" to be "50 dollars." At the time of making this contract there was an inconvertible paper dollar currency in the United States, and the actual exchange value of the paper dollar in English currency was then 2s. 8½d. It afterwards further depreciated in value. The voyage terminated at Liverpool in the United Kingdom, and the seaman was there discharged. Upon evidence that for twenty-five years past seamen discharged from American ships in London or Liverpool received their wages at the rate of 4s. 2d. a dollar:—*Held*, that the parties contracted subject to this usage, and that the seaman was entitled to have the dollars reckoned at the value of 4s. 2d. *Nonpareil* 355

4. The release by the master of his personal claim against the shipowner for wages does not operate as a release of the ship from his lien for such wages *Chieftain* 212

WAIVER. See **TENDER.**

WITNESSES. See **PRACTICE**, III., 9, 10.

CORRIGENDA.

Page 61, first head note—*for* “7th” *substitute* “6th”.

Page 74, line 12—*for* “; and the” *substitute* “. The”.

Page 226, third head note—*for* “before he is entitled to delivery of the goods; at least if he is entitled to sue for non-delivery,” *substitute* “if he is entitled to sue for non-delivery of the goods; and *semble* before he is so entitled.”

Page 301, line 19—*for* “neutral” *substitute* “mutual.”

Page 377, fourth head note—*for* “5th” *substitute* “6th”.

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